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In The
Supreme Court of the United States

ROBERT J. ROBINSON, JR., *et al.*,

Petitioners,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND, PLAN A, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does ERISA, including the Treasury Regulations made applicable to ERISA by 29 U.S.C. § 1202(c), forbid the termination or reduction of a disability pension?

PARTIES

The petitioners are Robert J. Robinson, Jr. and a class defined as all recipients of an Industry-Related Disability Pension from the Sheet Metal Workers' National Pension Fund who commenced receiving such a pension at any time between January 1, 1994 and December 31, 2004.

The respondents are the Sheet Metal Workers' National Pension Fund, Plan A, Marc E. LeBlanc, Administrator of the Fund, Michael J. Sullivan, Kenneth D. Alexander, Ronald Palmerick, Bruce Stockwell, Phil Meyers, R. Dean Steward, and Paul Collins Jr., Trustees of the Fund, and Charles Holt and John G. Agrela, former Trustees of the Fund.

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U.S. Bureau of Labor Statistics, U.S. Department of Labor, Bulletin 2589, National Compensation Survey: Employee Benefits in Private Industry in the United States, 2005 (2007) 18

Petitioners Robert J. Robinson, Jr., et al., respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on February 5, 2008.

OPINIONS BELOW

The February 5, 2008 opinion of the court of appeals, is reported at 515 F.3d 93 (2d Cir. 2008), and is set out at pp. 11a-14a of the Appendix. The April 14, 2008, order of the court of appeals denying rehearing, which is not officially reported, is set out at pp. 86a-87a. The July 27, 2006 memorandum of decision of the district court, which is reported at 441 F. Supp. 2d 405, is set out at pp. 15a-85a.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on February 5, 2008. A timely petition for rehearing was denied on April 14, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in an Appendix to the petition.

STATEMENT OF THE CASE

The question presented concerns whether disability pensions – a widespread feature of defined benefit pension plans – are protected by ERISA from elimination or reduction. As the litigation below illustrates, the answer turns on inter-related provisions of ERISA itself and of the Internal Revenue Code, and on certain overlapping and differently phrased regulations issued by the Secretary of Labor and the Secretary of the Treasury. The question presented implicates as well regulations promulgated by the Pension Benefit Guaranty Corporation.

The Regulatory Scheme

Federal regulation of pensions involves a "curious duplicate structure." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 747 (2004) (*quoting* J. Langbein & B. Wolk, Pension and Employee Benefit Law 91 par. 6 (3d ed. 2000)). The Employee Retirement Income Security Act of 1974 (ERISA) itself contains a range of specific substantive and procedural protections for pensioners and employees. In addition, many similar or related requirements are imposed by the Internal Revenue Code or Treasury regulations regarding plans which seek certain favorable tax treatment. 26 U.S.C. §§ 401 et seq.; 26 C.F.R. §§ 1.401-1 et seq. Section 1202(c) of ERISA expressly incorporates and gives the force of law to regulations issued by the Secretary of the Treasury under several provisions of the Internal Revenue Code, including

section 411.[1] 29 U.S.C. § 1202(c). Section 1202(c) requires ERISA plans to comply with those Treasury regulations, regardless of whether the plan wants or has sought the tax benefits that would arise from satisfying those tax regulations, and regardless of whether its actions otherwise satisfy the other provisions of ERISA.[2]

Because of this duplicate structure, a plan can be subject to two distinct related obligations under ERISA, those imposed by the express requirements of ERISA's substantive and procedural provisions and those established by the requirements of the Treasury regulations made binding on plans by section 1202(c). The instant case involves that very situation. The question addressed by the courts below, and presented by the petition, is whether ERISA permits the termination or reduction of a disability pension. As a result of this overlapping regulatory system, pension plans are subject to two different federal anti-cutback prohibitions. The question presented is whether either or both of those prohibitions forbid the

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[1] "Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 . . . shall also apply to the . . . standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter."

[2] See 29 C.F.R. § 2530.200a-2 ("Regulations prescribed by the Secretary of the Treasury or his delegate under sections 410 and 411 of the [Internal Revenue] Code . . . shall apply for purposes of sections 202 through 204 [29 U.S.C. §§ 1052-54] of [ERISA].")

termination or reduction of the disability pension that occurred in the instant case.

Section 204(g) of ERISA, 29 U.S.C. § 1054(g), establishes one of those anti-cutback rules. "With few exceptions, the 'anti-cutback' rule of [section 1054(g) of] ... ERISA ... prohibits any amendment of a pension plan that would reduce a participant's 'accrued benefit.'" *Central Laborer's Pension Fund*, 41 U.S. at 741. The Secretary of Labor is authorized to issue regulations implementing ERISA.[3] The courts below concluded that whether a disability pension is protected by section 1054(g) turns on whether a disability pension is a "pension plan" within the meaning of ERISA and on whether a disability pension constitutes a form of "early retirement" benefit. (App. 9a-10a, 34a-57a). Although the Labor Department regulations contain a definition of a pension plan, that definition does not deal specifically with disability pension plans. The Labor regulations do not contain any definition of early retirement benefit.[4]

Pension plans are also directly subject to the anti-cutback regulations issued by the Secretary of the Treasury that are incorporated by reference under section 1202(c). 26 C.F.R. §§ 1.411(d)-3, 1.411(d)-4. Those Treasury anti-cutback regulations implement section 411 of the Internal Revenue Code, which (in

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[3] The Secretary is precluded from issuing regulations specifically under section 1054(g). 29 U.S.C. § 1202(c).

[4] See 29 C.F.R. §§ 2510.3-1, 2510.3-2.

language similar to section 1054(g) of ERISA) denies certain important tax advantages to a benefit plan that reduces benefits protected under the Code. The Treasury regulations under section 411 of the Code address in detail the anti-cutback prohibition of that provision, and specifically refer to disability pensions as among the pensions that are protected by those regulations from reduction or elimination. 26 C.F.R. § 1.411(d)-4, Q&A-4. The Treasury regulations, unlike the Labor regulations, contain a definition of early retirement benefit. 26 C.F.R. § 1.411(d)-3(g). The instant litigation arises in part because of the differences between the Treasury and Labor regulations.

In this particular case, yet a third set of regulations is implicated. In the courts below the litigation regarding whether the respondents' actions violated section 1054(g) of ERISA turned on whether a disability pension is a "pension" under section 1002(2) of ERISA, which defines "employee pension benefit plan."[5] (App. 9a-10a, 34a). That same statutory definition also governs the Pension Benefit Guaranty Corporation (PBGC), which was created as part of the

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[5] Section 1002(2) defines "employee pension benefit plan" as:

> any plan, fund, or program . . . to the extent that . . . such plan, fund, or program –
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. . . .

1974 ERISA legislation. The pension guarantees provided by the PBGC "appl[y] to any plan which . . . is an employee pension benefit plan (as defined in paragraph (2) of section 1002)." 29 U.S.C. § 1321(a)(1). The PBGC has issued detailed regulations regarding what constitutes such a protected employee pension benefit plan, regulations which interpret the same provision at issue in the courts below. 29 C.F.R. § 4022.1 et seq. The PBGC regulations defining pension benefits protected by that agency repeatedly refer to disability pensions as among those covered. 29 C.F.R. §§ 4022.3-4022.6. Notices provided by the respondents to plan beneficiaries in this case assured them that the disputed disability pension at issue was indeed protected by the PBGC. (Ex. 23 (NPF 002900); Ex. 25 (NPF 003024-25)).

Because of the overlapping responsibilities of the Secretary of Labor, the Secretary of the Treasury, and the PBGC, Congress has adopted a number of provisions intended to coordinate these regulatory schemes. The Secretary of Labor is forbidden to issue or apply any regulations that are "inconsistent with the way in which [the Treasury] regulations apply under sections 410(a), 411, and 412 of Title 26." 29 U.S.C. § 1202(c). The Secretary of the Treasury in turn is required to consult with the Pension Benefit Guaranty Corporation before issuing certain regulations. 29 U.S.C. § 1202(e). The Secretaries of the Treasury and Labor must provide one another notice before taking adverse action regarding a particular

plan. 29 U.S.C. §§ 1202(a), 1202(b). Both the Secretary of Labor and the Pension Benefit Guaranty Corporation are required to "afford the Secretary of the Treasury a reasonable opportunity to review any . . . brief" they intend to file regarding minimum participation, vesting and funding standards. 29 U.S.C. § 1202(d). If the Secretary of Labor had contemplated filing a brief in the instant case, she would have been obligated by section 1202(d) to permit review of that brief by the Secretary of the Treasury. The Secretary of the Treasury has "the right to intervene in any . . . case" involving the interpretation of those standards. *Id.*

The coordination provisions of section 1202, however, do not and could not address every situation in which differences might arise among these regulatory schemes. The instant litigation involves just such a lack of coordination. The Treasury and PBGC regulations treat disability pensions as protected pensions; the Department of Labor regulations are silent on the matter. No brief was filed by the Secretary of Labor, the Secretary of the Treasury or the PBGC in the proceedings below. In the face of those regulatory differences, and in the absence of any brief from the government, the courts below concluded that under ERISA a disability plan is "not a pension plan, as th[at] term [is] used in ERISA." (App. 9a). Resolution of the instant petition might well be facilitated if the Solicitor General were invited to file a brief expressing the views of the United States regarding

the disparate regulatory schemes at issue in this case.

The Alternative Pensions Provided by the Sheet Metal Workers' Pension Fund

This case concerns the Sheet Metal Workers' National Pension Fund, a multi-employer pension plan established in 1966 and designed to qualify under section 401(a) of the Internal Revenue Code. 26 U.S.C. § 401(a). The various pensions provided by the Fund are paid for by contributions equal to about 10% of the gross wages of the participating employees, pursuant to the terms established by collective bargaining agreements. During the period relevant to the instant litigation the Fund offered a selection of four different pensions from which plan participants (to the extent they met the relevant eligibility requirements) could choose. Under each of the pensions the pensioner is entitled (absent certain exceptional circumstances) to monthly payments for life, with survivor benefits for his or her spouse.

The particular pension at issue in this case is the Industry-Related Disability Pension.[6] The Industry-Related Disability Pension allows participants to receive benefits when they are "totally and permanently

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[6] The Plan also has a separate Disability Pension for individuals who are permanently and totally disabled and have been approved for Social Security Disability. (Ex. 35 (NPF 003268-70)). That Disability Pension is not at issue in this case.

unable to return to employment in the Sheet Metal Industry," but are capable of employment in a different field. (App. 19a). Plan participants are only eligible for the Industry-Related Disability Pension if they have ten years of accumulated service in covered sheet metal jobs. (*Id.* n.4). The amount of the Industry-Related Disability Pension to which an individual is entitled depends on the beneficiary's wage rates and years worked as a sheet metal worker prior to retirement. The Industry-Related Disability Pension is a valuable option because workers forced by their disability to retire from the trade can begin receiving a pension before reaching the normal retirement age of 65. Ordinarily, on the other hand, the monthly benefits under the Industry-Related Disability Pension are significantly smaller than the benefits that would be paid if the worker opted for the normal retirement age pension.[7]

A worker who is eligible for two or more pensions provided by the Fund must make what is usually an irrevocable choice among those alternative pensions.[8]

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[7] Under the terms of the plan, the monthly amount of the Industry-Related Disability Pension, however, cannot exceed the monthly amount of the Normal Retirement Pension that would be paid if the worker were 65 on the day he or she became disabled. As a practical matter, however, that ceiling would not come into effect unless the worker started drawing the Industry-Related Disability Pension in his or her sixties.

[8] "A person shall be entitled to only one pension under this Plan, except that a Pensioner receiving a Disability Pension or an Industry-Related Disability Pension who recovers may be entitled to a different type of pension." Ex. 35 (NPF 003273).

A retiree who has chosen and received an Industry-Related Disability Pension cannot at age 65 switch to the higher monthly benefit Normal Retirement Pension otherwise available at that age.

The Plan declares ineffective any future Plan amendment that might reduce or eliminate an "accrued benefit," and in this regard draws no distinction between the Industry-Related Disability Pension and the other three alternative pensions. The Plan also notes that both ERISA and the Internal Revenue Code expressly forbid the reduction or elimination of certain benefits, and the Plan contains limitations on such changes that incorporate to at least some degree those legal restrictions. The official Plan descriptions provided to participants expressly assure beneficiaries that Industry-Related Disability Pensions are protected by the Pension Benefit Guaranty Corporation should the Plan become insolvent.[9] To the extent not limited by federal law or specific Plan provisions, however, the Plan authorizes the Trustees to amend the Plan.[10]

Petitioner Robinson began working in the sheet metal trade in 1973. In 1999, because of hip replacement surgery, he became totally and permanently disabled from working in the sheet metal industry. Robinson applied in 1999 for an Industry-Related Disability Pension and in 2000 began receiving

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[9] Ex. 23 (NPF 002900); Ex. 25 (NPF 003024-25).

[10] Ex. 35 (NPF 003324-25).

benefits under that Pension. The Industry-Related Disability Pension is limited to workers who are permanently unable to work in the sheet metal industry. Beneficiaries are, however, permitted to obtain employment in other fields.

Under the terms of the Industry-Related Disability Pension as it was initially adopted, and which remained in effect until 2005, beneficiaries of the Plan who were able to obtain such other employment were eligible for the Industry-Related Disability Pension regardless of how much they were able to earn in some other line of work. Consistent with that Plan provision, the application form which Robinson filled out in 1999 when he applied for the Industry-Related Disability Pension expressly stated that "Plan rules [regarding] a pensioner receiving an Industry-Related Disability Pension . . . *allows* [sic] *any other employment without an earnings'* [sic] *limitation*." (quoted in App. 26a) (emphasis in opinion)).[11]

After retiring from the sheet metal industry on an Industry-Related Disability Pension, Robinson was able to find other employment. His total income, including both his post-retirement earnings and the pension, was lower than his income would have been

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[11] Similarly, a Plan mandated notice provided to Robinson during the application process stated that a participant "may work at other employment, except Disqualifying Employment, without any earnings limitations." Ex. 28 (NPF 003089-90).

had he remained a sheet metal worker. In November 2004 the defendants amended the Plan to impose an earnings limitation on recipients of an Industry-Related Disability Pension. The November 2004 amendment terminated the Industry-Related Disability Pension for any recipient making more than a specified dollar ceiling; for Robinson that ceiling was approximately one-third of what his gross wages would have been as a sheet metal worker.[12] Applying this new amendment, the defendants terminated Robinson's Industry-Related Disability Pension, reducing his income by about one-third.[13]

The Proceedings Below

In 2005 Robinson commenced this action in the District Court for the District of Connecticut, on behalf of himself and a class of pensioners who had received an Industry-Related Disability Pension prior to January 1, 2005. The case was litigated below on

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[12] The cap on earnings was $35,000 a year. Ex. 17 (NPF 002327). Given the prevailing hourly rates, Robinson's earnings as a sheet metal worker would have been more than $100,000 in 2005. In the area where Robinson lives, a family of four with an annual income of only $35,000 would qualify for public housing under the income standards established by HUD and the State of Connecticut.

[13] After the respondents terminated Robinson's Industry-Related Disability Pension, he became eligible to receive another Fund pension for which he might later qualify, such as a Normal Retirement Pension when he reaches 65. In 2004, when the Plan was amended to impose an earnings ceiling, Robinson was 49.

the basis of a stipulated record including Plan documents and other documents. (App. 8a, 17a).

Robinson advanced two distinct legal challenges to the termination of his pension under the 2004 amendment. First, Robinson asserted that the termination violated the anti-cutback rule in section 1054(g) of ERISA. Second, Robinson contended that the termination violated the Treasury Regulation requirements which section 1202(c) imposes as a distinct obligation on plans regardless of whether they have sought or obtained qualified status under the Internal Revenue Code.[14]

The district court rejected Robinson's section 1054(g) claim in light of the Second Circuit's earlier decision in *Rombach v. Nestle USA, Inc.*, 211 F.3d 190 (2d Cir. 2000). The district court reasoned that section 1054(g) applies only to "pension plans," and that under *Rombach* a disability pension is to be treated as a welfare benefit plan rather than as a pension.

> Under ERISA, an employee benefit plan may be one of two general types – an "employee pension benefit plan," also known as a "pension plan;" or an "employee welfare benefit plan," also known as a "welfare benefit plan."

(App. 34a).

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[14] Plaintiffs' Trial Memorandum, pp. 18-43; Plaintiffs' Reply Memorandum, pp. 2-16.

> The distinction between a pension plan and a welfare benefit plan is critical to this case because, while the anti-cutback rule protects pension plans from diminution in benefits, it does not protect welfare plans.

(*Id.*). Thus, the court reasoned, a disability pension would be protected from cutbacks under section 1054(g) only if it constitutes a pension under ERISA. The district court concluded that a disability pension is not a "pension" under ERISA, and thus falls outside the protections of section 1054(g).

> [U]nder the directly applicable Second Circuit precedent of *Rombach*, the [Industry-Related Disability] plan is a welfare benefit plan and not a pension plan, and as a consequence, the [plan] is not subject to ERISA's anti-cutback rule.

(App. 36a; see 35a (disability pension is "not a pension benefit" under *Rombach*.))

The district court also rejected Robinson's section 1202(c) Treasury regulation claim. The Internal Revenue Service regulations regarding the anti-cutback provision in the Internal Revenue Code are set out in 26 C.F.R. §§ 1.411(d)-3 and (d)-4, which concern the scope of the anti-cutback provision in 26 U.S.C. § 411, particularly section 411(d)(6). Robinson contended that disability pensions are protected from cutbacks by § 1.411, relying in particular on Q&A-4 in section 1.411(d)-4. A-4 of the regulation states that under section 1.411(d) a plan may not authorize the administrator to exercise "discretion . . . to deny a

participant a section 411(d)(6) protected benefit." 26 C.F.R. § 1.411(d)-4 Q&A-4(a). The regulation further provides that this prohibition is not violated by a plan which gives

> [an e]mployer authority to determine whether objective criteria specified in the plan (e.g., objective criteria designed to . . . determine whether an employee has a permanent and total *disability*) have been satisfied.

26 C.F.R. § 1.411(d)-4 Q&A-4(b)(2) (emphasis added).[15] Robinson argued that this regulation necessarily means that disability-based pensions are indeed covered by section 1.411(d) of the regulations.

Proceeding in a somewhat unusual manner, the district court refused to apply section 1.411(d)-4 Q&A-4, reasoning that this Treasury regulation under section 411 of the Internal Revenue Code was inconsistent with *Rombach's* interpretation of section 1054(g) of ERISA.

> The language of the regulation cited by Plaintiffs does not by itself give the Court cause to ignore *Rombach*. If the Court is to disregard directly applicable Second Circuit

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[15] This portion of the regulation was reaffirmed in a notice issued by the Internal Revenue Service concerning benefits permitted to be provided in defined benefit plans (Internal Revenue Service Bulletin 2007-7 501, Notice 2007-14, Section II and n.3) and in an explanation of minimum vesting standards for defined contribution plans. (Department of the Treasury, Internal Revenue Service Publication 6389 (1-2006), p. 12.)

> precedent, something more than an ambiguous hint from a lone phrase in a Treasury Regulation will be required.

(App. 41a).

Robinson also argued that his disability pension is protected from termination because it constitutes an early retirement benefit as that phrase is defined in the Treasury regulations.

> The term *early retirement benefit* means the right, under the terms of a plan, to commence distribution of a retirement-type benefit at a particular date after severance from employment with the employer and before normal retirement age. Different early retirement benefits result from differences in terms relating to timing.

26 C.F.R. § 1.411(d)-3(g)(6)(i) (emphasis in original). As with Robinson's reliance on Q&A-4 of the regulations, the district court discarded the terms of the Treasury regulation in favor of caselaw under section 1054(g). The controlling definition of "early retirement benefit," the court insisted, was to be drawn from "[c]ases discussing Section 1054(g)." (App. 45a). Those decisions, according to the district court, limited early retirement benefit to benefits "that become available upon retirement at or after a specified age which is below the normal retirement age, and/or upon completion of a specified period of service." (*Id.* (quoting *Ross v. Pension Plan for Hourly Employees of SKF Indus., Inc.*, 847 F.2d 329, 333 (6th Cir. 1988)). The district court did not suggest that that

restriction – limiting early retirement benefits to plans in which the sole eligibility standard is either age or years of service – could be found in the definition in section 1.411(d)-3(g)(6)(i).

Having in this manner put aside both the express reference to disability pensions in section 1.411(d)-4 Q&A-4 of the IRS regulations and the specific definition of early retirement benefit in section 1.411(d)-3(g)(6)(i) of those regulations, the district court proceeded to undertake its own interpretation of the remaining portions of the section 1.411 regulations, and concluded that under those regulations the Industry-Related Disability Pension is not subject to the anti-cutback prohibition in section 1.411. (App. 57a).

The Second Circuit affirmed the rejection of Robinson's claims, expressly adopting the reasoning of the district court. (App. 9a-10a).[16] With regard to Robinson's section 1054(g) claim, the court of appeals insisted that a disability pension is "a welfare benefit plan, not a pension plan, as those terms are used in ERISA." (*Id.*).

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[16] "The district court thoroughly analyzed Appellants' ERISA anti-cutback claims and rejected them. . . . We concur completely in that portion of the district court's opinion." (App. 9a).

REASON FOR GRANTING THE WRIT

THE COURTS BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT

I. THE QUESTION OF WHETHER FEDERAL LAW PROTECTS DISABILITY PENSIONS FROM REDUCTION OR TERMINATION REQUIRES A PROMPT DEFINITIVE RESOLUTION

The decision of the court of appeals in the instant case creates grave and intolerable uncertainty regarding whether ERISA protects a form of pension included in the pension plans of millions of Americans. Approximately twenty-one million workers or pensioners are covered by defined benefit plans, plans which (unlike, for example, a section 401(k) plan) guarantee workers a pension benefit of a particular amount.[17] Seventy-six percent of these plans provide for some form of disability pension.[18] See, e.g., *Kentucky Retirement Systems v. EEOC*, 128 S.Ct. 2361 (2008) (disability pension for personnel who occupy hazardous positions).

Disability pensions generally have three common characteristics. First, like other pensions, they provide income for the life of the recipient and continuing

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[17] U.S. Bureau of Labor Statistics, U.S. Department of Labor, Bulletin 2589, National Compensation Survey: Employee Benefits in Private Industry in the United States, 2005, 90 (2007).

[18] *Id.* at 58.

benefits for a surviving spouse after the death of the recipient. Second, disability pensions are one of several mutually exclusive pension options which a worker can select in exercising his or her retirement rights; a worker who opts for a disability pension ordinarily[19] loses his or her right to other pensions, and cannot for example switch to a higher paying normal retirement age pension at age 65. Third, disability pensions permit the recipient to retire on that pension at a point in time earlier than would be permitted under the other pensions (e.g., before age 65),[20] but only if the recipient is disabled in the manner specified by the plan. Because of these characteristics disability pensions are at times referred to as disability early retirement.[21]

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[19] In the unlikely event that a worker earlier deemed "permanently" disabled were to recover from or overcome that disability, under these plans the worker generally would lose his or her disability pension, but thereafter be able to select some other pension for which he or she (possibly later) qualified.

[20] Those other pension requirements may be based, for example, on age, years of service, or some combination. See, e.g., *Kentucky Retirement Systems v. EEOC*, 128 S.Ct. 2361, 2365 (2008) (normal retirement after either 20 years of service or after 5 years of service provided that the employee has attained the age of 55).

[21] E.g., *Carroll v. Sequa Corp.*, 850 So.2d 835, 836 (La. App. 5 Cir. 2003); *George Washington University Medical Center v. District of Columbia Dept. of Employment Services*, 704 A.2d 1194, 1196 n.3 (D.C. 1997).

Conversely, early retirement plans where eligibility is based on age rather than disability (e.g., a plan permitting retirement at 55) are at times referred to as non-disability early retirement.

(Continued on following page)

The question presented is whether, despite the anti-cutback provisions of ERISA and the Treasury regulations which it incorporates, employers and multi-employer pension plans can terminate disability pensions, wiping out the disability pensions of pensioners like Robinson, who have retired because of disability and who are already receiving and relying on their disability pensions, and cutting off the rights of workers who are counting on those disability pensions in case of future illness or injury. That question, and the pension plan changes that gave rise to the instant litigation, strike at the very heart of ERISA, whose central purpose is to "protect[ ] employees' justified expectations of receiving the benefits their employers promise them." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004).

> ERISA . . . seek[s] to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits. . . . [W]hen Congress enacted ERISA, it "wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it."

Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996) (quoting *Nachman Corp. v. Pension Benefit Guaranty*

E.g., *Welsh v. State Employees' Retirement Bd.*, 808 A.2d 261, 265 (Pa. Cmwlth. 2002); *Crouse v. Com., State Employees' Retirement System*, 729 A.2d 1268, 1268 (Pa. Cmwlth. 1999).

Corporation, 446 U.S. 359, 375 (1980)). The anti-cutback rules in ERISA are "crucial to this object." *Central Laborers' Pension Fund*, 541 U.S. at 744.

The decision of the Second Circuit creates a loophole of breathtaking scope in the anti-cutback principle of ERISA. Under the decisions below an entire category of pensions – disability pensions – has been held unprotected by either section 1054(g) or the Treasury regulations incorporated by reference in section 1202(c). In *Central Laborers' Pension Fund* this Court noted that

> [w]ith few exceptions, the "anti-cutback" rule of . . . ERISA . . . prohibits any amendment of a pension plan that would reduce a participant's "accrued benefit."

541 U.S. at 741. Under the decision below, the treatment of disability pensions under the ERISA anti-cutback prohibitions is all exception and no rule.

The anti-cutback protections of ERISA are particularly important to workers who have suffered serious disabilities that render them unable to continue to work for their current employers, or perhaps to work at all. Unlike, for example, employees who may simply opt for early retirement at, for example, age 55 or 60, disabled workers essentially by definition have suffered a serious, at times severe, diminution in their ability to make a living. That loss of earning capacity may occur, as it did for Robinson, well before the workers are old enough to be eligible for any of their employer's other pension plans. In

addition, precisely because disability pensions become available at an earlier date, their lifetime value to disabled workers is usually greater than a later-commencing but larger monthly benefit.[22]

The exceptional scope of the decision below, and its serious financial implications for employers, pension plans, employees and pensioners alike, warrant a grant of review without awaiting further legal developments. The decision of the Second Circuit invites employers and pension plans to reduce their current expenditures and future liabilities by the simple expedient of rescinding, or sharply narrowing, disability pensions. That decision could hardly have occurred at a worse point in time, coming as it does during an economic downturn when employers and pension plans would doubtless welcome a way to reduce their expenditures. Termination of disability pensions would allow contributions originally intended (by employee and employer alike) to fund disability pensions to be diverted to other pensions (still protected by ERISA), reducing the need for current and future contributions for the remaining pensions. Simply put, an employer having difficulty making a profit by the hard work of selling goods or services now can improve its bottom line simply by

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[22] In the instant case, for example, the present day value of Robinson's Industry-Related Disability Pension ($550,423) was more than twice the value of the alternative Early Retirement Pension that would have become available when he reached 55 ($256,376). Ex. 1 (NPF 000040-41).

cutting off the disability pensions of its current and future pensioners. In economic terms, cancellations of disability pensions are the functional equivalent of a revenue source.

These unique circumstances warrant review by this Court at this time, without awaiting further legal developments in other circuits. If action by this Court is postponed until the question has been further addressed by the lower courts, and the termination of disability pensions is ultimately found to violate ERISA, a substantial and largely uncorrectable injustice will occur that defeats the central purpose ERISA. A decision by this Court several years hence that disability pensions are within the scope of ERISA protections will unavoidably come too late to correct the intervening harms to workers. Many pensioners whose benefits were lost, particularly those at smaller employers, will not succeed in retaining counsel and bringing suit. Even those who do so will be able to recover only the pension benefits wrongfully denied. Under ERISA awards of compensatory damages will not be available to redress the intervening injuries. See *Burlington Northern and Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 72-73 (2006) (injuries caused by temporary denial of income); *Schweiker v. Chilicky*, 487 U.S. 412, 415-16 (1988) (injuries caused by temporary denial of disability benefits); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (limiting remedies under ERISA).

Conversely, if as the courts below held, disability pensions can indeed be rescinded at the whim of an

employer or pension plan, employees and pensioners need to know that without further delay. Individuals who today are relying on disability pensions to meet their future financial needs if they are disabled in the future will be alerted to the need to buy some form of private disability insurance to safeguard against the eventuality of a disability pension cancellation. In addition, many workers – like the plaintiffs in the instant case – are required to make often irrevocable pension, financial and/or employment choices in light of current or anticipated disabilities. A worker who might otherwise select a disability pension (or a particular form of disability pension) needs to know if that pension is unreliable because of the possibility that it could lawfully be terminated at some future date.[23]

II. THE DECISIONS BELOW ARE INCONSISTENT WITH THE ALLOCATION OF REGULATORY AUTHORITY UNDER ERISA

The decisions of the courts below proceed from a fundamental misapprehension of the allocation of regulatory responsibility under ERISA.

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[23] In the instant case, for example, some disabled pensioners chose disability pensions with survivor benefits in order to protect their spouses, even though those pensions involved a smaller monthly benefit. When their disability pension was subsequently terminated under the disputed 2004 amendment, that sacrifice of income was for naught.

Robinson not only argued that the termination of his disability pension violated section 1054(g) itself, but also repeatedly and expressly asserted independent claims under the Treasury regulations. The lower courts, however, casually dismissed those Treasury regulations as little more than an interesting commentary, evidently proceeding instead on the assumption that only a violation of section 1054(g) itself is actionable under ERISA. Based on that view, the Treasury regulations were dismissed as merely an analogous body of material regarding the meaning of the Internal Revenue Code. At most, on this approach, the Treasury regulations were no more than an interesting factor that might be "considered by courts when analyzing [section 1054(g)]." (App. 39a n.11). But the controlling issue, the lower courts believed, was solely the interpretation of section 1054(g) itself. For that reason, the courts below insisted that caselaw interpreting section 1054(g) is the determining factor in resolving Robinson's claims.

But the Treasury regulations are not merely an interesting source of ideas regarding some other analogous statute. Those regulations expressly "*apply* to the minimum participation, vesting, and funding standards set forth in [sections 1051-86] of [ERISA]." 29 U.S.C. § 1202(c) (emphasis added). The Treasury Department has correctly insisted that

> the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in [the section 411] regulations for purposes of ERISA, as well as the Code.

> Thus, these final regulations issued under sectio[n] 411(d)(6) of the Code apply as well for the purposes of section [1054](g) of ERISA . . . .

70 Fed. Reg. 47109, 47110 (2005); see 69 Fed. Reg. 13769, 13770 (2004). Under the regulatory scheme established by Congress, primary responsibility for establishing standards in this complex area is accorded to the Secretary of the Treasury. "The IRS has [regulatory] jurisdiction over . . . benefit accrua[l] and vesting." *Central Laborers' Pension Fund*, 541 U.S. at 747 (quoting Langbein & Wolk 92, par. 7). The courts are not at liberty to pick and choose among Treasury regulations under section 411, heeding only those regulations which happen to coincide with the judiciary's own interpretation of section 1054(g).

Rather than apply the section 411 regulations to Robinson's ERISA claim, as directed by section 1202(c), the decisions below did essentially the opposite. After excluding from consideration those section 411 regulations which the lower courts thought were contrary to "directly applicable" section 1054(g) caselaw (App. 36a), the decisions below proceeded to announce an authoritative interpretation of what remained of the Treasury regulations, arriving at a result consistent with section 1054(g) caselaw but at odds with the excised regulations. The decision of the Second Circuit – emphatically endorsing this analysis – establishes in that circuit an interpretation of certain provisions of the Treasury Department's section 411 regulations that is inconsistent with other

portions of those very regulations, provisions which the courts deemed contrary to their own reading of section 1054(g) caselaw.

The decisions below determined an important tax question with substantial consequences over and above the Treasury anti-cutback regulations. The Second Circuit expressly agreed with the district court's holding that the disability pension in the instant case constitutes an "ancillary benefit" under section 1.411(d)-3(g)(2) of the Treasury regulations. (App. 9a, 52a-53a). That conclusion rested on the meaning of the phrase "qualified disability benefit" in section 411(a)(9) of the Internal Revenue Code. (App. 48a-51a). The analysis of the courts below turned on the holding that the comparative analysis required by section 411(a)(9) concerns the size of the monthly payment made pursuant to a disability benefit, rather than the total actuarial (or present day) value of that benefit. (App. 51a n.12). This interpretation of "qualified disability benefit" substantially alters the meaning of section 411(a)(9) which deters the granting of disability benefits greater than a "qualified disability benefit" by denying important tax advantages to employers who do so. For example, employers frequently provide a disability benefit in the form of a fixed number of months during which a disabled employee, although unable to work, still receives all or most of his or her regular wages. E.g., *General Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976) (26 weeks of disability pay). Under the decisions below, such disability payments would no longer constitute a

qualified disability benefit in most cases because workers' monthly wages are usually greater than their pensions.

The courts below have announced this major interpretation (or editing) of the Treasury regulations in a case in which the United States was not a party.

III. THE SECOND CIRCUIT'S DECISION REGARDING WHAT CONSTITUTES AN "EMPLOYEE PENSION BENEFIT PLAN" UNDER SECTION 1002(2) OF ERISA CONFLICTS WITH THE REGULATIONS OF THE PENSION BENEFIT GUARANTY CORPORATION

The linchpin of the decision below was the Second Circuit's insistence that a disability pension is not a pension under section 1002(2) of ERISA. The definition of "employee pension benefit plan" in section 1002(2) also is utilized under the Pension Benefit Guaranty Corporation subchapter of ERISA. Section 1321(a) of that subchapter states in part that it "applies to any plan . . . which . . . is an employee pension benefit plan (as defined in paragraph (2) of section 1002 of this title.)" 29 U.S.C. § 1321(a). If, as the Second Circuit held, a disability plan is not an employee pension benefit plan within the meaning of section 1002(2) of ERISA, disability plans would also fall outside the scope of section 1321(a) of the Pension Benefit Guaranty Corporation portion of ERISA.

The regulations issued by the PBGC, however, repeatedly provide that disability pensions *are* covered

by the PBGC statute, and thus are among the benefits guaranteed by the PBGC. Section 4022.4(a)(3) states that a participant is deemed "entitled to a benefit," inter alia, if "on or before the termination date [of the plan], in the case of a requirement that a participant . . . become disabled . . . the participant had satisfied the conditions of the plan." 29 C.F.R. § 4022.4(a)(3). Section 4006.4(a) provides that "[a] participant's disability benefit is not vested if the participant is not disabled." Section 4022.6 is devoted entirely to certain rules regarding an "[a]nnuity payable for total disability." Sections 4281.14(d) and 4281.14(e) set out mortality assumptions to be used in connection with those receiving "disability benefits." All of these regulations reflect the PBGC's view that "employee pension benefit plan" in section 1002(2) includes a disability pension.

The decision below has created the incongruous legal situation in which a disability plan is an employee pension benefit plan for purposes of the PBGC, but not for purposes of subchapter I of ERISA, even though the PBGC and subchapter I ERISA originated in the same 1974 legislation. The resulting inconsistency between these closely related regulatory schemes is highlighted by the fact the respondents expressly assure workers that the Industry-Related Disability Pension is protected by the PBGC, while resolutely insisting in this litigation that for purposes of ERISA the Industry-Related Disability Pension is not a pension at all.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States. Such an invitation would provide the government with an appropriate occasion to coordinate the positions of the Secretary of Labor, the Secretary of the Treasury, and the Pension Benefit Guaranty Corporation with regard to the important questions at issue in this case. The views of the United States could be of particular assistance to the Court because the interpretation of the Secretary of Labor or the Secretary of the Treasury of their respective regulations would ordinarily be entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: October 5, 2007 Decided: February 5, 2008)

Docket No. 06-3923-cv

ROBERT J. ROBINSON JR., on behalf of himself and all others similarly situated and THOMAS J. DONOHUE, on behalf of himself and all others similarly situated,

Plaintiffs-Appellants,

– v. –

SHEET METAL WORKERS' NATIONAL PENSION FUND, PLAN A, MARC E. LEBLANC, MICHAEL J. SULLIVAN, CHARLES HOLT, JOHN G. AGRELA, KENNETH D. ALEXANDER, RONALD PALMERICK, BRUCE STOCKWELL, PHIL MEYERS, R. DEAN STEWARD AND PAUL COLLINS JR.,

Defendants-Appellees.

Before: FEINBERG, CALABRESI, and WESLEY, *Circuit Judges.*

Appellants assert that the amendment of their disability pension, after they had become disabled and were receiving benefits from it, violates the Employee Retirement and Income Security Act of

1974, 29 U.S.C. §§ 1001-1461, and constitutes both a breach of contract and a breach of fiduciary duty. Deciding, by agreement of the parties, on a stipulated record, the district court found for Appellees on all claims.

The appeal is dismissed as moot as to Appellant Donohue and all class members over the age of fifty-five, and the judgment of the district court is affirmed as to Appellant Robinson and all other class members.

KATHRYN EMMETT, Emmett & Glander (Christine Caulfield, *on the brief*), Stamford, Conn., *for Plaintiffs-Appellants.*

STEPHEN M. ROSENBLATT, Deputy General Counsel, Sheet Metal Workers' National Pension Fund, Alexandria, Va., *for Defendants-Appellees.*

GUIDO CALABRESI, *Circuit Judge*:

Plaintiffs-Appellants Robert Robinson, Jr. and Thomas Donohue and the class they represent were recipients of an Industry-Related Disability Pension ("IRD") from Defendant-Appellee Sheet Metal Workers' National Pension Fund. In 2004, the IRD was amended to add an earnings limitation. Appellants, who were receiving the IRD before the 2004 amendment went into effect, assert that the amendment's application to them violates the Employee Retirement

Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and constitutes both a breach of contract and a breach of fiduciary duty.[1] The district court, Kravitz, *J.*, acting on a stipulated record, found for Appellees on all issues. *See Robinson v. Sheet Metal Workers' Nat'l Pension Fund,* 441 F. Supp. 2d 405 (D. Conn. 2006). Appellants brought this timely appeal.

I. BACKGROUND

A. The Pension Plan

The Sheet Metal Workers' National Pension Fund is a multi-employer plan, established in 1966. In 1994, the Plan was amended by its Trustees to include the IRD, in addition to its Normal Retirement Pension, Early Retirement Pension, and Disability Pension. The IRD pays benefits to participants when they are "totally and permanently unable to return to employment in the Sheet Metal Industry," but are capable of gainful employment in some other field. The IRD is available to employees who have not attained the Normal Retirement Age (sixty-five), but

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[1] Appellants also asserted in the district court that Appellees were promissorily estopped from applying the earnings limitation to them. *See Robinson v. Sheet Metal Workers' Nat'l Pension Fund,* 441 F. Supp. 2d 405, 432-33 (D. Conn. 2006). Appellants, however, have not raised that issue before this Court; it is therefore waived. *See Dillon v. Morano,* 497 F.3d 247, 255 (2d Cir. 2007).

who have earned sufficient pension and service credits. IRD benefits are calculated as follows:

> The [IRD] shall be 10% greater than the amount of the Early Retirement Pension . . . , except that in no event shall the [IRD] exceed the Normal Retirement Pension amount . . . that would be payable if the Participant had attained Normal Retirement Age on the day he became disabled.

Eligibility for the IRD "is determined by the Trustees, in their sole and absolute discretion," and the Trustees may make eligibility subject to periodic medical examinations. "These terms and any other terms as deemed necessary by the Trustees may be required as a prerequisite to the granting or continuance of an [IRD]." Beneficiaries who lose eligibility for an IRD on account of recovery from their disability may be entitled to a different type of pension, including Early Retirement or Normal Retirement. A participant who is eligible to receive benefits under the Plan "shall be entitled upon retirement to receive the monthly benefits provided for the remainder of his life, subject to the provisions of this Plan."

The Plan gives the Trustees "the sole and absolute power, authority and discretion" to interpret and apply the Plan. It moreover provides that the Trustees may "amend[ ] [it] at any time . . . *consistent with the provisions of the Trust Agreement*" (emphasis added). Thus, the Trustees' amending power is limited by the provision that "no amendment shall be effective if it is deemed to decrease the accrued

benefit of any Participant."[2] Under the Plan, "'Accrued Benefit' shall mean generally the annual pension benefit provided under the Plan commencing at Normal Retirement Age." The Plan more specifically provides that

> a Plan Amendment that has the effect of (1) eliminating or reducing an early retirement benefit or a retirement-type subsidy or (2) eliminating an optional form of benefit (as determined under applicable Treasury Regulations), with respect to benefits attributable to service before the amendment shall be treated as reducing Accrued Benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a Participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy. In general, a retirement-type subsidy is a subsidy that continues after retirement, but does not include a qualified disability benefit (within the meaning of Section 411(a)(9) of the Code), a medical benefit, a social security supplement, or a death benefit (including life insurance).

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[2] There are two exceptions to the rule that no amendment can decrease the accrued benefit of any participant: (1) if the amendment is necessary to comply with federal law, and (2) if the amendment meets the requirements of § 302(c)(8) of ERISA and § 412(c)(8) of the Internal Revenue Code and the Secretary of Labor has either approved it or failed to disapprove it within ninety days. Neither exception is relevant here.

The Plan also defines "Vested Status," which is the status "attained when a Participant acquires a nonforfeitable right to his Normal Retirement Benefit or a nonforfeitable right to 100 percent of his Accrued Benefit." A participant acquires a nonforfeitable right to his Normal Retirement Benefit upon reaching the Normal Retirement Age.

In accordance with their obligations under ERISA, 29 U.S.C. § 1022, Appellees have issued Summary Plan Descriptions ("SPDs"), which summarize the terms of their plans. The SPDs state that they do not comprehensively set forth all of the terms of the Plan. The SPDs in the Plan before us repeatedly note that the Trustees have the authority to amend the Plan. Thus, the 1997 SPD states that "[t]he Trustees are empowered to amend the Plan at any time in accordance with the law and for such purposes as the Trustees deem appropriate." And the 2002 SPD confirms that "[t]he Trustees reserve the right to amend, modify or terminate the Plan at any time," and also that "[t]he Board of Trustees reserves the right to terminate, modify, suspend or amend the Pension Plan at any time, in whole or in part, under circumstances allowed by ERISA and the terms of the governing Trust Agreement. The Board will make such changes to the Plan by Plan Amendment. You will be notified in writing of any changes that are made."

In a November 2004 amendment, the Industry-Related Disability Pension was renamed the Industry-Related Disability *Benefit*. The amended Plan, for

the first time, imposed an earnings limitation on IRD benefits:

> Effective for Plan years beginning on or after January 1, 2005, an [IRD] recipient who earns $35,000 or more in any calendar year, in any employment whatsoever, will be deemed no longer disabled for any purpose under the Plan and his benefit shall terminate. . . .

IRD recipients were notified of this change by letter in December 2004.[3]

B. Appellants

Robert Robinson, Jr., who was born in 1955, began working in the sheet metal trade in 1973. After a hip replacement surgery in 1999, he applied for the IRD. The application form stated that he would "receive the monthly benefit payment listed for [his] lifetime." It also noted that "Plan rules prohibit a pensioner receiving an [IRD] to work in Disqualifying Employment, BUT allows [*sic*] any other employment without an earnings' limitation." His application was granted, and he began receiving IRD benefits.

Thomas Donohue began working in the sheet metal industry in 1969. In 1998, he became disabled. At the time, he was fifty-five years old and therefore

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[3] In October 2005, the Plan was again amended to eliminate the earnings limitation for those fifty-five or older. *See infra* note 4.

had the option of retiring on either an Early Retirement Pension or an IRD. Because the IRD offered greater benefits, he selected that option.

In January 2005, Robinson filed an administrative appeal protesting the November 2004 amendment and its application to his benefits. This appeal was denied. In June 2005, he filed this action; in September 2005, it was amended to add Donohue as a plaintiff. Appellants then moved to certify the case as a class action, and the parties agreed on a joint stipulation as to certification. The district court certified a class of "[a]ll recipients of an [IRD] from the Plan who commenced receiving an [IRD] at any time during the period of January 1, 1994 to December 31, 2004."[4] Shortly thereafter, the parties agreed to seek judgment on a stipulated record. And on July

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[4] The Plan was again amended in October 2005 to restrict the earnings limitation to those under the age of fifty-five. Donohue is therefore now unaffected by the limitation, and his claim – along with the claims of other class members over the age of fifty-five – is now moot. Robinson and the remainder of the class members are, however, unaffected. The Supreme Court has held that the mootness of the claims of even the *only* lead plaintiff does not moot a class action. *See Kremens v. Bartley*, 431 U.S. 119, 129-30 (1977); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 755-56 (1976); *Sosna v. Iowa*, 419 U.S. 393, 399 (1975). It follows *a fortiori* that the mootness of the claims of one of two lead plaintiffs does not moot the class action, so long as "there are questions of law or fact common to the class" and "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(2), (4). As that is the case here, we proceed to consider the merits as to Robinson and those class members under the age of fifty-five.

27, 2006, the district court found for Appellees on all counts.

II. DISCUSSION

Before us, Appellants assert three claims. First, they argue that applying the earnings limitation to their IRDs would violate ERISA's "anti-cutback" rule, 29 U.S.C. § 1054(g). Second, they contend that the earnings limitation constitutes a breach of contract. And finally, they assert that the earnings limitation would, as to them, be a breach of Appellees' fiduciary duties.

We note first that Appellants' fiduciary duties claim derives from the contract claim, the ERISA claim, or both. If Appellees owed a fiduciary duty to Appellants in this case, it must have arisen as a result of contractual or statutory obligations. And hence any fiduciary duty claim depends for its survival on the validity of these latter claims. It is these we therefore must examine.

The district court thoroughly analyzed Appellants' ERISA anti-cutback claims and rejected them. *Robinson,* 441 F. Supp. 2d at 416-26. We concur completely in that portion of the district court's opinion. In particular, we agree with that court that the IRD is a welfare benefit plan, not a pension plan, as those terms are used in ERISA. We moreover agree with its determination that the IRD is an ancillary benefit, not an accrued benefit. Either of

these findings would suffice to exempt the IRD from ERISA's anti-cutback rule.

We turn next to Appellants' breach of contract claim. Because the district court's judgment was based entirely on a stipulated record, our standard of review for that claim is *de novo*. *Skoros v. City of N.Y.*, 437 F.3d 1, 13 (2d Cir. 2006). We have held that, "absent explicit language to the contrary, a plan document providing for disability benefits promises that these benefits vest with respect to an employee no later than the time that the employee becomes disabled." *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1212 (2d Cir. 2002). Appellees thus bear the burden of identifying "explicit language reserving [the Fund's] right to terminate or alter a disabled employee's benefits." *Gibbs ex rel. Estate of Gibbs v. CIGNA Corp.*, 440 F.3d 571, 577 (2d Cir. 2006) (internal quotation marks omitted).

Appellees assert that their statements – in both the Plan and the SPDs – which note that the Trustees may amend the Plan at any time suffice to satisfy this requirement. We agree. As noted above, both the Plan itself and the SPDs state that the Trustees may amend the Plan "at any time." The sole express exception to this amending power is that no amendment may reduce an accrued benefit. The contractual question, therefore, becomes: did the amendment reduce an accrued benefit? And the answer to that question, in turn, depends on a series of linked definitions that are given in the Plan. We examine these in detail.

(1) The Plan says, first, that an amendment that reduces a retirement-type subsidy is treated as reducing an accrued benefit. (2) It goes on to define "a retirement-type subsidy [as] a subsidy that continues after retirement," but makes clear that such a retirement-type subsidy "does not include a qualified disability benefit (within the meaning of Section 411(a)(9) of the Code)." (3) That section of the Internal Revenue Code provides that "a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age." 26 U.S.C. § 411(a)(9)(B).

This latter definition settles the contractual matter before us, for:

> (1) The Plan explicitly states that the IRD cannot "exceed the Normal Retirement Pension amount . . . that would be payable if the Participant had attained Normal Retirement Age on the day he became disabled."
>
> (2) This means that the IRD cannot exceed the benefit which would be provided if the participant separated from employment at the normal retirement age.
>
> (3) It follows that the IRD is a qualified disability benefit and is *not* a retirement-type subsidy under the Plan.
>
> (4) A reduction of the IRD therefore does not reduce an accrued benefit.

Because the impermissibility of decreasing an accrued benefit is the only stated exception to the Trustees' power to amend the Plan in the manner here done, and because a reduction in the IRD is not a reduction of an accrued benefit, the unambiguous effect of the Plan's and SPDs' language is that the IRD benefit could be so amended.

Appellants direct our attention to language in a number of Plan documents describing the IRD as a "lifetime" pension or a pension to be paid "for life." We addressed a very similar situation in *Abbruscato v. Empire Blue Cross & Blue Shield,* 274 F.3d 90, 99 (2d Cir. 2001), where we said,

> Here, . . . we have SPD language that *both* appears to promise lifetime life insurance coverage at a particular level *and* clearly reserves [the insurer's] right to amend or terminate such coverage. Because the same document that potentially provided the "lifetime" benefits also clearly informed employees that these benefits were subject to modification, we conclude that the language contained in [that document] is not susceptible to an interpretation that promises vested lifetime . . . benefits.

As the district court correctly noted, the "lifetime" language in Plan documents was "merely a factually correct statement of the benefits then provided by the Plan – benefits that were expressly subject to amendment 'at any time.'" *Robinson,* 441 F. Supp. 2d at 431; *see also Sprague v. Gen. Motors*

Corp., 133 F.3d 388, 401 (6th Cir. 1998) ("We see no ambiguity in a summary plan description that tells participants both that the terms of the current plan entitle them to health insurance at no cost throughout retirement and that the terms of the current plan are subject to change."). Indeed, the "lifetime" language in the Plan is expressly made "subject to the provisions of this Plan," which, of course, include the amendment provisions. Notably, in the context of the IRD, the "lifetime" language *cannot* be taken literally to mean that, once a participant begins to receive IRD benefits, he will necessarily remain entitled to them for the remainder of his life. For example, the IRD clearly ends if the participant ceases to be disabled. And the Plan explicitly states that an IRD recipient may be required to undergo periodic medical examinations in order to provide "evidence of continued entitlement to such benefit." Read in context, then, the "lifetime" language does not give Appellants a contractual and absolute right to continue receiving the IRD for their lives.

III. CONCLUSION

Under *Feifer* and *Abbruscato*, Appellants had no vested contractual right to continue receiving the IRD. Moreover, their claim that applying the earnings limitation to their IRDs violates ERISA's anti-cutback rule has been aptly disposed of by the district court.

In light of the failure of those two arguments,[5] Appellants' fiduciary duty argument must fail as well.

Accordingly, the appeal is DISMISSED as to Appellant Donohue and those class members over the age of fifty-five, and the judgment of the district court is AFFIRMED as to Appellant Robinson and all other class members.

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[5] We decide only the case before us and deal just with the aforementioned amendments to the IRD. We have no occasion to consider, for example, whether ERISA would place restrictions on other types of amendments or would require particular language in SPDs when dealing with changes that could be draconian, e.g., a total elimination of benefits to people who, by joining the Plan, forewent other, guaranteed, benefits. All that is beyond the scope of the present case, and we express no view on it either way.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT J. ROBINSON, JR., and THOMAS J. DONOHUE, on behalf of themselves and all others similarly situated,	:	NO. 3:05CV917 (MRK)
Plaintiffs,	:	
v.	:	
SHEET METAL WORKERS' NATIONAL PENSION FUND, PLAN A, et al.,	:	
Defendants.	:	

MEMORANDUM OF DECISION

(Filed Jul. 27, 2006)

Plaintiffs Robert Robinson, Jr. and Thomas Donohue bring this action on behalf of themselves and other similarly situated individuals who retired from the sheet-metal trade on Industry-Related Disability ("IRD") benefits under the Sheet Metal Workers' National Pension Fund (the "Plan") between January 1, 1994, and December 31, 2004. Plaintiffs sue the Plan,[1] the Plan's Trustees, and the Plan's

[1] Prior to 2002, the Plan was divided into two sections – Plan A for construction employees and Plan B for production employees. The Trustees merged Plans A and B in 2002. There are no differences material for present purposes between the relevant portions of Plan A, Plan B, and the post-merger Plan. While only Plan A is a named defendant in this suit, the plaintiff

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administrator, claiming that Defendants improperly amended the Plan in 2004 to reduce IRD benefits for those earning more than $35,000 in a given year. Plaintiffs sue under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (2006), alleging causes of action under ERISA's anti-cutback rule, as well as for breach of contract, promissory estoppel, and breach of fiduciary duties. Am. Compl. [doc. # 31]. Defendants deny Plaintiffs' allegations and also contend that Mr. Donohue's claims are moot. Answer and Affirmative Defenses [doc. # 47].

Plaintiffs moved to certify this case as a class action pursuant to Rule 23 of the *Federal Rules of Civil Procedure,* Mot. for Class Certification [doc. # 41], and the parties agreed on a proposed joint stipulation as to certification, which identified certain claims and issues as suitable for resolution on a class basis.[2] Resp. of Def. to Pls.' Mot. for Class

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class includes beneficiaries of all three plans. Throughout this Memorandum of Decision, all three Plans are referred to interchangeably as the "Plan."

[2] In their Proposed Stipulated Order Certifying Class [doc. # 59], the parties proposed that the Court certify a class including "[a]ll recipients of an Industry-Related Disability Pension from the Plan who commenced receiving an Industry-Related Disability Pension at any time during the period of January 1, 1994 to December 31, 2004." *Id.* at 2-3. The issues certified would include:

> all claims and issues raised in the First Amended Complaint that impact all class members, including the issue of whether, as Plaintiffs contend, based on

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Certification [doc. # 59]. After concluding that class certification was appropriate, the Court certified a class of "[a]ll recipients of an Industry-Related Disability Pension from the Plan who commenced receiving an Industry-Related Disability Pension at any time during the period of January 1, 1994 to December 31, 2004." Stipulated Order Certifying Class [doc. # 66] at 2-3. The certification order encompassed all issues common to class members that could be decided based solely on the stipulated record, which comprised stipulated facts and over eight volumes and 5000 pages of documents. The Court excluded from certification:

> all issues related to Plaintiffs' estoppel claim a) that cannot be tried on the basis of the stipulated record alone or b) that cannot be decided as a matter of law at this juncture and all issues that pertain only to those individuals, like Plaintiff Donohue, who are or will be excluded from the $35,000 earnings limitation. . . .

> the stipulated record alone, they satisfy the "extraordinary circumstances" requirement for the application of estoppel principles in this ERISA case or, whether, as Defendants contend, as a matter of law, it is impossible, based on the stipulated record, that any facts can be discovered that will allow Plaintiffs to establish "extraordinary circumstances" in this type of an ERISA case.

Id. at 1-2.

Id. at 2. Any excluded issues would be dealt with in further proceedings. Neither side believes that facts outside the stipulated record are necessary to resolve this case. The Court agrees.

Both Plaintiffs and Defendants seek judgment based on the stipulated record. On April 18, 2006, the Court heard extensive oral argument on claims common to all class members. After considering the parties' submissions and arguments, the Court concludes that the amendments to the Plan do not violate ERISA, and therefore, the Court grants judgment for Defendants. Part I of this opinion represents the Court's findings of fact under Rule 52 of the *Federal Rules of Civil Procedure;* Part II represents the Court's conclusions of law.

I.

The following findings of fact are based upon the undisputed documentary record.

A. The 1994 Plan

The Sheet Metal Workers' National Pension Fund is a multi-employer plan, established in 1966 and designed to qualify under Section 401(a) of the Internal Revenue Code ("the Code"), located at 26 U.S.C. § 401(a). In 1994, the Plan was amended by its Trustees to include an Industry-Related Disability ("IRD") Pension, in addition to its Normal Retirement Pension, Early Retirement Pension, and Disability Pension.

The IRD Pension allows participants to receive benefits when they are "totally and permanently unable to return to employment in the Sheet Metal Industry" but are capable of employment in a different field. Ex. 35 at 3270.[3] The IRD Pension is available only to employees who have not attained "Normal Retirement Age," defined elsewhere in the Plan as age 65 (subject to a years-of-service requirement), and who have earned sufficient pension and service credits. Ex. 35 at 3232, 3270.[4] Monthly benefits under the

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[3] All exhibit citations refer to the exhibits that constitute the Joint Stip. Concerning Docs. [doc. # 76].

[4] The Plan provides as follows:

> (a) A Participant shall be entitled to retire on an Industry-Related Disability Pension if it is determined by the Trustees, in their sole and absolute discretion, on the basis of objective medical evidence that the Participant is totally and permanently unable to return to employment in the Sheet Metal Industry, but is capable of gainful pursuit or performing employment in another field, after January 1, 1994, and at a time when:
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> (1) he has not attained Normal Retirement Age;
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> (2) he has at least 10 years of Pension Credits;
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> (3) he has at least 12 months of Future Service Credit;
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> (4) he has worked in Covered Employment for at least 435 hours in the 24 month period that immediately preceded the date that the Trustees determined he became totally and permanently unable to return to employment in the Sheet Metal Industry; and
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> (5) after September 1, 1988, he has not at any time performed any employment in the Sheet Metal Industry that was not covered by a Collective

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IRD Pension are determined by a formula based on the Early Retirement Pension benefits to which the employee would be entitled. However, "in no event [is] the Industry-Related Disability Pension [allowed to] exceed the Normal Retirement Pension amount . . . that would be payable if the Participant had attained Normal Retirement Age on the day he became disabled."[5] Ex. 35 at 3272.

Eligibility for an IRD Pension "is determined by the Trustees, in their sole and absolute discretion," and beneficiaries may be required to submit to

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Bargaining Agreement between the union and the employer.

Ex. 35 at 3270.

[5] The Plan states as follows:

> The monthly amount of the Industry-Related Disability Pension shall be equal to the amount of the Early Retirement Pension to which the Participant would have been entitled . . . based on the years of Pension Credit which the Participant had earned up to the time of his disability. . . . The Industry-Related Disability Pension shall be 10% greater than the amount of the Early Retirement Pension . . . except that in no event shall the Industry-Related Disability Pension exceed the Normal Retirement Pension amount . . . that would be payable if the Participant had attained Normal Retirement Age on the day he became disabled. If a Participant qualifies for an Industry-Related Disability Pension which is effective before age 55, the amount of the benefit shall be computed as though the Participant were age 55 on the Effective Date of Pension.

Ex. 35 at 3272.

periodic medical examinations. The Plan provides that "[t]hese terms and any other terms as deemed necessary by the Trustees may be required as a prerequisite to the granting or continuance of an Industry-Related Disability Pension." Ex. 35 at 3271. Eligibility for an IRD Pension terminates when the beneficiary "is no longer totally and permanently unable to return to employment in the Sheet Metal Industry," but any beneficiary who loses eligibility for an IRD Pension on account of recovery may be entitled to a different type of pension, such as a Normal Retirement or Early Retirement Pension. *Id.* at 3272-73.

The Normal Retirement Pension is available to Plan participants reaching Normal Retirement Age, and is payable under one of two benefit categories, each with its own eligibility requirements and benefit schedules. *Id.* at 3258-66. The Early Retirement Pension is for participants age 55 and above who meet certain service and credit requirements. *Id.* at 3266-68. The Early Retirement Pension is paid in the amount of the Normal Retirement Pension, reduced by a percentage proportional to the difference in months between the beneficiary's age and Normal Retirement Age.[6] *Id.* at 3268. The Disability Pension

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[6] According to the Plan:

(1) The amount of the Early Retirement Pension shall be the amount of the Normal Retirement Pension . . . which the Participant would have been entitled to if he were then of Normal Retirement Age, but

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is similar to the IRD Pension, except that eligible participants must be "permanently and totally disabled so that [they] cannot perform any significant employment in any field whatsoever as demonstrated by proof of approval for Social Security Disability." Ex. 35 at 3268. In addition to the four above-noted benefits, the Plan also provides retiree health benefits, which are described as "ancillary benefits" that "are subordinate to the retirement benefits provided by the Plan." *Id.* at 3326.

Unless a beneficiary opts otherwise, all Plan pensions are paid as a "Husband-and-Wife Pension," which "provide[s] a lifetime pension for a married Participant plus a lifetime pension for his or her surviving spouse, starting after the death of the Participant." *Id.* at 3274. Plan beneficiaries are "entitled upon retirement to receive the monthly benefits provided for the remainder of his life, subject to the provisions of [the] Plan." *Id.* at 3288; *see also*

> reduced by 1/2 of 1% for each month by which the participant is younger than age 65 on the Effective Date of his Early Retirement Pension.
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> (2) Effective for Early Retirement Pensions commencing on or after June 1, 1979 . . . the amount of the Early Retirement Pension shall be the amount of the Normal Retirement Pension . . . which the Participant would have been entitled to if he were then of Normal Retirement Age, but reduced by 1/2 of 1% for each month by which the Participant is younger than age 62 (i.e., over age 55 but less than 62), plus 1/4 of 1% for each month between age 62 and 65.

Ex. 35 at 3268.

id. ("Except as otherwise provided in the Plan, pension payments to the Pensioner shall end with the payment for the calendar month in which the death of the Pensioner occurs.").

The Plan gives the Trustees sole authority to interpret and apply the Plan,[7] *id.* at 3287, and provides that the Trustees may amend it "at any time . . . consistent with the provisions of the Trust Agreement," Ex. 35 at 3324. Indeed, several provisions of the Plan confirm the Trustees' authority to amend the Plan. *See, e.g., id.* at 3227 ("Pursuant to their authority . . . the Trustees have amended the Plan from time to time."); *id.* at 3228 ("The term 'Plan' or 'Pension Plan' shall mean the provisions of the Rules and

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[7] The full provision is as follows:

> The Trustees shall have the sole and absolute power, authority and discretion to determine:
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> (a) the standard of proof required in any case;
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> (b) the application and interpretation of this Plan;
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> (c) entitlement to or amount of a pension;
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> (d) the disability, extent of disability, or non-disability of Plan participants; and
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> (e) the crediting of Future or Past Service Credit.
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> (f) the crediting of Hours of Work and Years of Service.
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> The decisions of the Trustees with respect to any of the foregoing shall be final and binding. Wherever in the Plan the Trustees are given discretionary powers, the Trustees shall exercise such powers in a uniform and non-discriminatory manner.

Ex. 35 at 3287-88.

Regulations for the Sheet Metal Workers' National Pension Fund, as amended and restated effective January 1, 1994, together with any subsequent amendments duly adopted by the Trustees."). However, the Plan expressly provides that "no amendment shall be effective if it is deemed to decrease the *accrued benefit* of any Participant." *Id.* at 3324 (emphasis added). The term "accrued benefit" is defined in the Plan as "the annual pension benefit provided under the Plan commencing at Normal Retirement Age," interpreted in accordance with Section 411(a)(7) of the Internal Revenue Code and Treasury Regulations promulgated thereunder.[8] *Id.* at 3235.

The Plan also contains provisions regarding "Vested Status," which "is attained when a Participant acquires a nonforfeitable right to his Normal Retirement Benefit or a nonforfeitable right to 100 percent of his Accrued Benefit." Ex. 35 at 3293. A participant's entitlement to his Normal Retirement

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[8] The full provision provides as follows:

> The term "Accrued Benefit" shall mean generally the annual pension benefit provided under the Plan commencing at Normal Retirement Age. Notwithstanding the foregoing, the term "Accrued Benefit" shall be interpreted in accordance with Section 411(a)(7) of the Code and the Treasury Regulations promulgated thereunder.

Id. at 3235.

Pension becomes nonforfeitable at Normal Retirement Age, subject to a years-of-service requirement.[9]

Finally, the Plan notes that "ERISA and the Code also provide certain limitations on any Plan amendments that may reduce or eliminate a Protected Benefit." *Id.* at 3295. Therefore, the Plan declares to be ineffective any amendment that decreases a participant's accrued benefit. *Id.* The Plan also describes those amendments that are treated as reducing accrued benefits:

> For purposes of this subsection . . . , a Plan amendment that has the effect of (1) eliminating or reducing an early retirement benefit or a retirement-type subsidy . . . with respect to benefits attributable to service before the amendment shall be treated as reducing Accrued Benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a Participant who satisfies (either before or after the amendment) the pre-amendment

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[9] Another provision in the Plan addressing vested status states as follows:

> While the Plan provides Early Retirement and Disability Pensions on the basis of requirements that may be met by some Participants who have not attained Vested Status, such eligibility rules represent provisions of the Plan above and beyond its vesting schedule.

Ex. 35 at 3294. The meaning and import of this provision is not entirely clear to the Court, but neither party argues that it affects the outcome of this case.

> conditions for the subsidy. In general, a retirement-type subsidy is a subsidy that continues after retirement, but does not include a qualified disability benefit (within the meaning of Section 411(a)(9) of the Code), a medical benefit, a social security supplement, or a death benefit (including life insurance).

Id. at 3295. This provision of the Plan mirrors ERISA's anti-cutback rule and a Senate Report construing that rule, both of which are described below.

B. Plaintiffs Robinson and Donohue

Robert Robinson, Jr. began working in the sheet metal trade in 1973. Ex. 1 at 79. Because of hip replacement surgery in 1999, he became totally and permanently disabled from working in the sheet-metal industry. *Id.* at 86. Through his union membership, Mr. Robinson was a participant in the Plan, and he applied for an IRD Pension in September 1999. The application forms stated that an IRD beneficiary would "receive the monthly benefit payment . . . for [his] lifetime." Ex. 28 at 3081. The forms also provided that "Plan rules prohibit a pensioner receiving an Industry-Related Disability Pension to work in Disqualifying Employment [i.e. in the sheet metal or construction industry], *BUT allows* [sic] *any other employment without an earnings'* [sic] *limitation." Id.* at 3082 (emphasis added); *see also id.* at 3089-90 (noting that a beneficiary "may work at other employment, except Disqualifying Employment, without

any earnings limitation"). Mr. Robinson's application for an IRD Pension was granted, and he began to receive benefits.

Thomas Donohue began working in the sheet metal trade in about 1969. In July 1998, he became disabled as a result of spinal stenosis and other health conditions, which prevented him from continuing to work in the sheet-metal industry. Ex. 2 at 148-64. Mr. Donohue was 55 years old at the time, and so he was offered the option of retiring on either an Early Retirement Pension or an Industry-Related Disability Pension. Ex. 41 at 56-62. Because the IRD Pension offered Mr. Donohue greater benefits than the Early Retirement Pension, and because – unlike the Early Retirement Pension – the IRD Pension offered the opportunity to later switch to a full Disability Pension, Mr. Donohue chose the IRD Pension. Ex. 2 at 183; Ex. 35 at 3272-73. Like Mr. Robinson and Mr. Donohue, 438 other class members became disabled from working in the sheet-metal industry and retired on IRD Pensions between January 1, 1994, and December 31, 2004. Ex. 46 at 664-72.

C. Summary Plan Descriptions

In accordance with their obligations under ERISA, Defendants have issued Summary Plan Descriptions ("SPDs") designed to summarize the Plan's terms. *See* 29 U.S.C. § 1022(a) ("A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries. . . ."). These SPDs

caution that they do not set forth all the Plan's terms. *See, e.g.*, Ex. 23 at 2866 (1997 SPD) ("Please understand that no general explanation can adequately give you all of the details of the Plan, and that this general explanation does not change or expand or otherwise interpret the terms of the Plan."). As is relevant here, the SPDs at several points discuss the Trustees' authority to amend the Plan. For example, on its first page, the 1997 SPD notes that a beneficiary terminating his employment before January 1, 1994, would receive benefits "determined in accordance with the provisions of the Plan in effect on the date his employment terminated, except to the extent otherwise specifically provided under subsequent Plan amendments or restatements." *Id.* The SPD further states: "The Trustees are empowered to amend the Plan at any time in accordance with the law and for such purposes as the Trustees deem appropriate. The Trustees are further empowered to terminate the Plan." *Id.* at 2900; *see also* Ex. 25 at 2952 (2002 SPD) ("IMPORTANT NOTICE: . . . The Trustees reserve the right to amend, modify or terminate the Plan at any time."); Ex. 25 at 3024 ("The Board of Trustees reserves the right to terminate, modify, suspend or amend the Pension Plan at any time, in whole or in part, under circumstances allowed by ERISA and the terms of the governing Trust Agreement. The Board will make such changes to the Plan by Plan Amendment.").

D. The 2004 and 2005 Amendments

After the 1994 version, the Plan went through several other versions without any material changes relevant here. *See, e.g.*, Exs. 3, 5-10, 18-19. In January 2004, Defendants amended the Plan to impose an earnings limitation on the IRD Pension, adding the following language to a section entitled "Restriction on Employment by Disability Pensioner":

> Effective January 1, 2005, an Industry-Related Disability Pensioner will be subject to the following employment earnings limitation: the highest hourly base rate in his last Local Union for the previous Calendar Year multiplied by 1800 hours.

Ex. 11 at 1258. This provision also appeared in a version of the Plan reissued in March. Ex. 12 at 1424. However, the change was not reported in the "Summary of Material Modifications" that Plan participants were sent in July, 2004. Ex. 26 at 3067-69.

In November 2004, Defendants again amended the Plan. What had previously been described as an "Industry-Related Disability Pension" was now described as an "Industry-Related Disability Benefit." Ex. 13 at 1644-50. Like the January and March versions, the November version also included an earnings limitation on the receipt of IRD benefits:

> Effective for Plan years beginning on or after January 1, 2005, an Industry-Related Disability Benefits recipient who earns $35,000 or more in any calendar year, in any

> employment whatsoever, will be deemed no longer disabled for any purpose under the Plan and his benefit shall terminate.

Ex. 13 at 1648. Defendants argue, and the Court agrees, that the earnings limitation represents a change from the 1994 Plan in terms of the definition of who is disabled for purposes of eligibility for an IRD benefit. Under the Amended Plan, a recipient of an IRD benefit who earns over $35,000 will lose his eligibility to receive IRD benefits, though "he will be permitted to elect any type of pension for which he qualifies . . . and his pension will be unaffected by the prior receipt of any Disability Benefits that he was eligible to receive." Ex. 32 at 3121.

The November 2004 amendment applied to all pensions granted prior to January 1, 2005. Recipients of IRD benefits were notified of the change by letter on December 16, 2004. Ex. 27 at 3076. In January 2005, Mr. Robinson filed an administrative appeal protesting the November 2004 amendment and its application to his benefits. Ex. 1 at 3. Following a denial of his appeal by the Appeals Committee of the Sheet Metal Workers' National Pension Fund in March, Ex. 1 at 19-20, Mr. Robinson filed this action in June. He amended the Complaint in September to add Mr. Donohue as a plaintiff. Proposed First Am. Compl. [doc. # 26]. The Plan was amended again in 2005 to restrict the earnings limitation only to those under the age of 55. Ex. 17 at 2327. As a result, Mr. Donohue is unaffected by the earnings limitation, though Mr. Robinson is.

II.

This case requires the Court to determine whether Defendants violated ERISA by limiting IRD benefits to those recipients who earn less than $35,000 in a given year. The Court notes that its decision is limited to recipients who are under the age of 55, since the 2005 amendment to the Plan exempted workers aged 55 and above from the IRD earnings limitation.

"[A] district court reviews a plan administrator's denial of benefits under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Gibbs v. CIGNA Corp.*, 440 F.3d 571, 575 (2d Cir. 2006) (internal quotation marks omitted). "Where the plan reserves discretionary authority for the administrator, . . . denials are subject to the more deferential arbitrary and capricious standard, and may be overturned only if the decision is without reason, unsupported by substantial evidence or erroneous as a matter of law." *Id.* (internal quotation marks omitted). Here, the Plan makes crystal clear that the Trustees retain authority to interpret and apply the Plan. *See, e.g.*, Ex. 35 at 3287 ("The Trustees shall have the sole and absolute power, authority and discretion to determine . . . the application and interpretation of this Plan. . . ."). Thus, to the extent that the parties dispute the meaning or proper application of Plan provisions, an arbitrary and capricious standard of review applies. However, on questions of

statutory interpretation, a court "owe[s] the plan administrators no deference." *Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 581 (2d Cir. 2006) ("The interpretation of ERISA, a federal statute, is a question of law subject to *de novo* review." (internal quotation marks omitted)). Therefore, insofar as a disputed issue turns on the proper interpretation of statutes or regulations, the Court applies a *de novo* standard of review.[10]

Having set forth the relevant standard of review, the Court next addresses each of Plaintiffs' claims in turn.

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[10] To be sure, whether a dispute concerns issues of plan interpretation or issues of statutory interpretation is not always clear. Furthermore, the Second Circuit has only added to the difficulty of the task by repeatedly declining in ERISA cases to declare the applicable standard of review. *See, e.g., Frommert v. Conkright*, 433 F.3d 254, 266 n.11 (2d Cir. 2006) (noting that "[i]t is not settled whether a *de novo* or arbitrary and capricious standard of review applies" but declining to decide); *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 110 (2d Cir. 2003) (noting that "the standard of review to be applied when the question is whether the SPD complies with ERISA's disclosure requirements is not so clear" but declining to decide); *Layaou v. Xerox Corp.*, 238 F.3d 205, 212 (2d Cir. 2001) ("express[ing] no view on whether the deferential standard of review for a plan administrator's interpretation of a plan . . . is applicable to a plan administrator's interpretation of an SPD, where it has been determined that the SPD violates the disclosure requirements of 29 U.S.C. § 1022"); *Moriarity v. United Tech. Corp. Represented Employees Ret. Plan*, 158 F.3d 157, 158 (2d Cir. 1998) (per curiam) (declining to resolve the issue of what standard of review applies to a plan administrator's interpretation of an SPD).

A. ERISA's Anti-Cutback Rule

ERISA contains a so-called "anti-cutback" rule that "prohibit[s] amendments to pension plans which diminish the accrued benefits of the participants." *Perreca v. Gluck,* 295 F.3d 215, 228 (2d Cir. 2002). The rule provides as follows:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8) or 4281 [29 USC § 1082(c)(8) or 1441].
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of –
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> > (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), . . .
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits.

29 U.S.C. § 1054(g) (2006). Plaintiffs first argue that the addition of the IRD earnings limitation in November 2004 violated ERISA's anti-cutback rule.

Defendants do not deny that the earnings limitation decreased the benefits available under the IRD plan. *See Cent. Laborer's Pension Fund v. Heinz,* 541 U.S. 739, 744-45 (2004) (holding that a plan amendment imposing a new condition on the continued receipt of a benefit triggers anti-cutback protection). Instead, they argue that the IRD benefit is not the

type of employment benefit to which the anti-cutback provisions of Section 1054(g) applies. The Court agrees.

1. Pension Plan v. Welfare Benefit Plan

Under ERISA, an employee benefit plan may be one of two general types – an "employee pension benefit plan," also known as a "pension plan;" or an "employee welfare benefit plan," also known as a "welfare benefit plan." 29 U.S.C. § 1002(3) (2006). Section 1002 provides that a plan is a pension plan "to the extent that [it] . . . provide[s] retirement income to employees, or . . . results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A). A plan is a welfare benefit plan "to the extent that such plan . . . was established or is maintained for the purpose of providing for its participants or their beneficiaries . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment" (as well as several other types of benefits that are not relevant for present purposes). 29 U.S.C. § 1002(1). The distinction between a pension plan and a welfare benefit plan is critical to this case because, while the anti-cutback rule protects pension plans from diminution in benefits, it does not protect welfare plans. *See* 29 U.S.C. § 1051(1) (2006) (providing that the portion of ERISA that includes Section 1054(g)'s anti-cutback rule does not apply to "an employee welfare benefit plan").

In interpreting Section 1002(1), which defines a "welfare benefit plan," the Second Circuit has held that the anti-cutback rule does not apply to any plan, or *portion* of a plan, that provides disability benefits. *Rombach v. Nestle USA, Inc.*, 211 F.3d 190, 193 (2d Cir. 2000). Thus, in *Rombach*, the court held as follows:

> The wording of Section 1002(1) seems to confirm defendants' position that the . . . Plan, while not "solely" a disability plan, is an "employee welfare benefit plan" *to the extent that* it provides welfare-type benefits. In our view, the words "to the extent that" rather than "solely" clearly indicate that Congress intended to allow any plan or part of a plan having disability provisions to be considered an "employee welfare benefit plan," and thus be exempt from [anti-cutback protection].

Id. at 193 (emphasis in original) (quoting *McBarron v. S & T Indus., Inc.*, 771 F.2d 94, 98 (6th Cir. 1985)); *see also Gibbs v. CIGNA Corp.*, 440 F.3d 571, 576 (2d Cir. 2006) ("Long-term disability plans fall within ERISA's definition of an 'employee welfare benefit plan.'"). Indeed, in *Rombach*, the Second Circuit held that a disability benefit was not a pension benefit, despite the fact that the plan itself described the disability benefit as a "pension" and the disability benefit was part of a master plan that also included a variety of retirement pensions, such as early retirement pensions and normal retirement pensions. *Rombach*, 211 F.3d at 194 ("[I]t does not matter that Nestle called the disability retirement

pension portion of its plan a 'pension benefit' and made it part of its master 'pension plan.'"). To the *Rombach* court, a disability benefit is a welfare benefit because "it was a benefit triggered by disability." *Id.* ("[U]nder the plain language of the statute, 'to the extent' that [the] Pension Plan provides benefits that are triggered by disability, that portion of the plan is a welfare plan under § 1002(1)."); *see McBarron,* 771 F.2d at 97 (quoted with approval in *Rombach*) ("Since the plan in question provides employees with 'benefits in the event of . . . disability,' it is clearly an 'employee welfare benefit plan' as contemplated by ERISA."). And because the disability benefit offered in *Rombach* was a welfare benefit plan, it was not subject to ERISA's anti-cutback rule.

Like the benefit at issue in *Rombach,* the IRD benefit in this case is a disability benefit, because it is triggered by disability and terminates when the beneficiary is no longer disabled. In the words of Section 1002(1), the IRD provides "benefits in the event of . . . disability." As a result, under the directly applicable Second Circuit precedent of *Rombach,* the IRD plan is a welfare benefit plan and not a pension plan, and as a consequence, the IRD is not subject to ERISA's anti-cutback rule. *See Neely v. Pension Trust Fund of the Pension, Hospitalization & Benefit Plan of the Elec. Indus.,* No. 00 CV 2013, 2003 WL 21143087, at *5 (E.D.N.Y. Jan. 16, 2003) ("Plaintiff's disability retirement pension is an employee welfare benefit plan and therefore, Defendants were free to amend the plan at any time.").

Plaintiffs offer several arguments in response. First and foremost, Plaintiffs argue that *Rombach* was wrongly decided. Pls.' Corrected Reply Trial Mem. [doc. # 84] at 16 ("*Rombach's* holding . . . is incorrect. . . ."). Plaintiffs contend that *Rombach* was "incorrectly decided to the extent that [it] hold[s] that a disability pension cannot be a pension protected under [the anti-cutback rule] because it must be classified as a welfare benefit." Pls.' Trial Mem. [doc. # 71] at 35. Plaintiffs stress that some disability benefits, such as the IRD benefit, involve the sort of long-term payment programs that typify pensions, and therefore *Rombach* erroneously concluded that disability plans may not be pension plans. However, the IRD benefit in this case is virtually indistinguishable from the disability benefit involved in *Rombach*. Under these circumstances, this Court is not at liberty to ignore *Rombach's* clear holding. In short, whatever the substantive merit of Plaintiffs' criticisms of *Rombach*, this Court is not the proper venue in which to press them.

Second, Plaintiffs note that before the 2004 Amendment, the Plan repeatedly referred to the IRD benefit as a "Pension." *See, e.g.*, Ex. 35 at 3258 (describing the IRD benefit under the "Pension Eligibility and Amounts" heading); *id.* at 3270 (describing the IRD benefit as a "Pension"); *id.* (describing eligibility criteria). And on the "Annual Return/Report of Employee Benefit Plan" forms Defendants submitted to the IRS in 2000, 2001, 2002, and 2004, Defendants did not differentiate between IRD benefit funds and

other pension funds, grouping all under the heading of "Pension benefits" rather than "Welfare benefits." Ex. 39 at 3556; Ex. 42 at 81; Ex. 43 at 220; Ex. 44 at 590.

As noted above, however, the court in *Rombach* rejected the proposition that a disability plan would become a pension plan merely because the plan administrator chose to describe it as such. *Rombach,* 211 F.3d at 194. In short, it is not the label, but rather the substance that controls. Therefore, whatever it was called, the IRD benefit's "meaning and function remained clear; it was a benefit triggered by disability." *Id.*

Third, Plaintiffs argue that other cases have recognized that disability benefits may be properly classified as pension benefits rather than as welfare benefits. Plaintiffs cite a litany of cases in which courts generally described or called disability plans "disability pensions." *See, e.g., Eichel v. N.Y. Cent. R.R. Co.,* 375 U.S. 253, 254-55 (1963) (holding that evidence of payment under a "disability pension" was not admissible on the issue of whether plaintiff was malingering); *Larsen v. NMU Pension Trust of the NMU Pension & Welfare Plan,* 902 F.2d 1069, 1073 (2d Cir. 1990) (reversing summary judgment on the issue of whether defendant's material misrepresentation caused employee to forgo a "disability pension"). Indeed, Plaintiffs even cite a case in which the same IRD benefit at issue in this case was described by a court as a "pension." *See Gilliam v. Trustees of Sheet Metal Workers' Nat'l Pension Fund, Plan A,* No.

03-CV-7421, 2005 WL 1026330, at *4 (S.D.N.Y. May 3, 2005) ("[T]he Industry-Related Disability Pension pays a reduced pension when an eligible participant is unable to work in the sheet-metal industry, but can hold other types of employment.").

The Court declines Plaintiffs' invitation to read these cases as support for the proposition Plaintiffs advance. None of the cited cases even discusses the issue that *Rombach* squarely resolved: whether a disability plan qualifies for anti-cutback protection under ERISA. The casual description of disability benefits as "pensions" in the cases cited hardly constitutes a basis for ignoring a directly on-point Second Circuit precedent – particularly since all of the decisions cited by Plaintiffs are either district court cases, decisions from other jurisdictions, or decisions that pre-date *Rombach*.

Finally, Plaintiffs cite to Treasury Department regulations that suggest disability benefits may qualify as protected benefits.[11] In the "Questions and

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[11] The Internal Revenue Code contains an anti-cutback provision that closely mirrors the language of Section 1054(g). *See* 26 U.S.C. § 411(d)(6) ("A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan. . . ."). Because of the close fit between ERISA's anti-cutback rule and the Code's anti-cutback rule, regulations relating to the latter are often considered by courts when analyzing the former. *See Cent. Laborers' Pension Fund,* 541 U.S. at 747 ("Although the pertinent regulations refer only to the Internal Revenue Code version of the anti-cutback rule, they apply with equal force to

(Continued on following page)

Answers" section, the Treasury regulations note that some changes to benefits protected by the Code's anti-cutback rule are allowed:

> (b) Exception for administrative discretion. A plan may permit limited discretion with respect to the ministerial or mechanical administration of the plan, including the application of objective plan criteria specifically set forth in the plan. Such plan provisions do not violate the requirements of section 411(d)(6) or the definitely determinable requirement of section 401(a), including section 401(a)(25). For example, these requirements are not violated by the following provisions that permit limited administrative discretion:
>
> . . . .
>
> (2) Employer authority to determine whether objective criteria specified in the plan (e.g., objective criteria designed to identify those employees with a heavy and immediate financial need or *objective criteria designed to determine whether an employee has a permanent and total disability)* have been satisfied; . . . .

Treas. Reg. § 1.411(d)-4, Q&A (4) (2005) (emphasis added). Plaintiffs point to the italicized language quoted above and argue that unless disability benefits

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[29 U.S.C. § 1054(g)]."). Therefore, in analyzing ERISA's anti-cutback rule, the Court will at times refer to Code regulations.

can sometimes qualify as protected benefits, there would be no reason to exempt from anti-cutback protection an employer's evaluation of whether disability criteria had been satisfied.

The language of the regulation cited by Plaintiffs does not by itself give the Court cause to ignore *Rombach*. If the Court is to disregard directly applicable Second Circuit precedent, something more than an ambiguous hint from a lone phrase in a Treasury Regulation will be required. Therefore, the Court reaffirms its conclusion that the IRD plan is a welfare benefit plan, and that it is not protected by ERISA's anti-cutback rule.

2. Accrued Benefits v. Ancillary Benefits

Even if the Court were to ignore *Rombach* and find the IRD benefit to be a pension benefit, that would not necessarily result in the IRD benefit receiving protection from the anti-cutback rule. For Section 1054(g) protects only an "accrued benefit" and two types of benefits that are treated like accrued benefits – "early retirement benefits" and "retirement-type subsidies." *See Arndt v. Security Bank S.S.B. Employees' Pension Plan,* 182 F.3d 538, 540-41 (7th Cir. 1999). Moreover, the anti-cutback rule does not protect "ancillary benefits." *See* 26 C.F.R. § 1.411(d)-3(b)(3)(i) ("[The Code's anti-cutback rule] does not provide protection for benefits that are ancillary benefits, other rights and features, or any other benefits that are not described in [the anti-cutback

rule]."). Defendants argue that the IRD benefit is not an accrued benefit, early retirement benefit, or retirement-type subsidy. The Court agrees, and moreover concludes that the IRD benefit is an ancillary benefit. Therefore, the benefit is not subject to the protection of ERISA's anti-cutback provision.

a. Accrued Benefits

Accrued benefits typically are "expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A); *see McDonald v. Pension Plan of NYSA-ILA Pension Trust Fund*, 320 F.3d 151, 156 (2d Cir. 2003) ("'Accrued' benefits refer to those normal retirement benefits that an employee has earned at any given time during the course of employment."). However, the definition of accrued benefit also includes benefits "as provided in section 1054(c)(3)," which in turn provides as follows:

> For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial

> equivalent of such benefit or amount determined under paragraph (1) or (2).

29 U.S.C. § 1054(c)(3).

Plaintiffs seize on the phrase "accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age" (which appears in the second and third lines quoted above) as an indication that the IRD benefit is an accrued benefit because it is an amount other than the annual benefit commencing at normal retirement age. However, Section 1054(c)(3) does not indicate that any benefit may qualify as an accrued benefit, whether related to retirement or not, so long as its amount differs from what the employee would receive at normal retirement age. Indeed, the provision is not meant to help identify what is or is not an accrued benefit. Instead, the language of Section 1054(c) applies to benefits already identified as accrued: it is intended merely to specify the *value* that an accrued benefit must have if it is paid in a manner "other than an annual benefit commencing at normal retirement age." *See Esden v. Bank of Boston*, 229 F.3d 154, 164 (2d Cir. 2000) (explaining that Section 1054(c)(3) embodies a "rule that regardless of any option as to timing or form of distribution, a vested participant in a defined benefit plan must receive a benefit that is the actuarial equivalent of her normal retirement benefit (that is, the accrued benefit expressed as an annuity beginning at normal retirement age)"); *Spacek v. Maritime Ass'n*, 134 F.3d 283, 290 (5th Cir. 1998) (noting that Section 1054(c)(3)

expresses "the general rule that, where an employee's pension benefit commences at a time other than normal retirement age, the accrued portion of such a benefit is the actuarial equivalent of the retirement benefit available at normal retirement age"), *abrogated on other grounds by Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004). There is no indication in the language or legislative history of ERISA that a disability benefit might qualify as an accrued benefit under Section 1054(c)(3); Indeed, the regulations flatly state that "[i]n general, the term 'accrued benefits' refers only to pension or retirement benefits." *See* 26 C.F.R. § 1.411(a)-7(a)(1)(ii). Plaintiffs cite no authority to the contrary. Therefore, the Court concludes that the IRD benefit is not an accrued benefit.

b. Early Retirement Benefit

"The term early retirement benefit means the right, under the terms of a plan, to commence distribution of a retirement-type benefit at a particular date after severance from employment with the employer and before normal retirement age. Different early retirement benefits result from differences in terms relating to timing." 26 C.F.R. § 1.411(d)-3(g)(6)(i). Plaintiffs make a perfunctory attempt to argue that the IRD benefit is an early retirement benefit because IRD benefit payments commence "at a particular date after severance from employment with the employer and before normal retirement age" – namely, the IRD benefit commences "no sooner than

the seventh month of . . . the total and permanent inability to return to employment in the Sheet Metal Industry. . . . " Ex. 35 at 3271.

Plaintiffs have again attempted to shoe-horn the IRD benefit into an ill-fitting heading. Cases discussing Section 1054(g) describe "early retirement benefits" in precisely the terms that the phrase naturally evokes. Just as retirement plans typically allow for retirement at the "normal retirement age" – often, age 65 – early retirement plans allow for retirement at an age earlier than the normal retirement age – often, age 55. *See, e.g., Bellas v. CBS,* 221 F.3d 517, 525 (3d Cir. 2000) ("[E]arly retirements often commence at age 55 and possibly require the fulfilment of a minimum period of service."). Thus, in *Ross v. Pension Plan for Hourly Employees of SKF Indus., Inc.,* 847 F.2d 329 (6th Cir. 1988), the Sixth Circuit explained that under the "widely understood meaning of the term[ ]," "[e]arly retirement benefits are generally benefits that become available upon retirement at or after a specified age which is below the normal retirement age, and/or upon completion of a specified period of service." *Id.* at 333.

Here, the Plan includes an Early Retirement Pension, which (subject to a years-of-service requirement) commences at age 55 rather than the normal retirement age of 65. Unlike the Early Retirement Pension, the IRD benefit is not triggered by attainment of a particular age or period of service, but rather by an industry-related disability. Once again, Plaintiffs cite no authority to support their assertion

that a benefit triggered by a disability may be properly classified as an early retirement benefit. The Court rejects Plaintiffs' unsupported argument and concludes that the IRD benefit is not an early retirement benefit.

c. Retirement-Type Subsidy

The definition of "retirement-type subsidy" is enmeshed with the definition of "retirement-type benefit." Treasury regulations provide as follows:

> (iii) Retirement-type benefit. The term retirement-type benefit means –
>
> > (A) The payment of a distribution alternative with respect to an accrued benefit; or
> >
> > (B) The payment of any other benefit under a defined benefit plan (including a QSUPP as defined in § 1.401(a)(4)-(12) that is permitted to be in a qualified pension plan, continues after retirement, and is not an ancillary benefit.
>
> (iv) Retirement-type subsidy. The term retirement-type subsidy means the excess, if any, of the actuarial present value of a retirement-type benefit over the actuarial present value of the accrued benefit commencing at normal retirement age or at actual commencement date, if later, with both such actuarial present values determined as of the date the retirement-type benefit commences. Examples of retirement-type

> subsidies include a subsidized early retirement benefit and a subsidized qualified joint and survivor annuity.
>
> (v) Subsidized early retirement benefit or early retirement subsidy. The terms subsidized early retirement benefit or early retirement subsidy mean the right, under the terms of a plan, to commence distribution of a retirement-type benefit at a particular date after severance from employment with the employer and before normal retirement age where the actuarial present value of the optional forms of benefit available to the participant under the plan at that annuity starting date exceeds the actuarial present value of the accrued benefit commencing at normal retirement age (with such actuarial present values determined as of the annuity starting date). Thus, an early retirement subsidy is an early retirement benefit that provides a retirement-type subsidy.

26 C.F.R. § 1.411(d)-3(g)(6). As one court has explained, "a retirement benefit is a retirement-type subsidy if the sum of the monthly payments for the participants's life exceeds what the participant would have received as normal retirement benefits." *Richardson v. Pension Plan of Bethlehem Steel Corp. & Subsidiary Cos.*, 67 F.3d 1462, 1468 (9th Cir. 1995) (citing cases), *opinion withdrawn by* 91 F.3d 1312 (9th Cir. 1996), *and different result reached on other grounds by* 112 F.3d 982 (9th Cir. 1997).

Congress intended that the term "retirement-type subsidy" would be further defined by regulations, but as of yet, no such regulations have been promulgated. However, an oft-quoted Senate Report explained the term as follows:

> The bill provides that the term "retirement-type subsidy" is to be defined by Treasury regulations. The committee intends that under these regulations, a subsidy that continues after retirement is generally to be considered a retirement-type subsidy. *The committee expects, however, that a qualified disability benefit,* a medical benefit, a social security supplement, a death benefit (including life insurance), or a plant shutdown benefit (that does not continue after retirement age) *will not be considered a retirement-type subsidy.*

S. Rep. No. 98-575, at 30 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 2547, 2576 (emphasis added) [hereinafter Senate Report]. A "qualified disability benefit" is defined in the regulations as "a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age." 26 U.S.C. § 411(a)(9) (referenced in 26 C.F.R. § 1.411(d)-3(g)(2)(ii)).

Here, the Plan specifically states that "in no event shall the Industry-Related Disability Pension exceed the Normal Retirement Pension amount . . . that would be payable if the Participant had attained

Normal Retirement Age on the day he became disabled." Ex. 35 at 3272. Because the IRD benefit is a disability benefit that, by definition, cannot exceed the benefits payable upon normal retirement, it is a qualified disability benefit within the meaning of 26 U.S.C. § 411(a)(9) and thus precisely the sort of benefit that ERISA's legislative history indicates does not qualify as a "retirement-type subsidy."

The Fifth Circuit's decision in *Williams v. Plumbers & Steamfitters Local 60 Pension Plan,* 48 F.3d 923 (5th Cir. 1995) is illustrative. There, the court rejected plaintiff's claim that a plan's disability benefit was a retirement-type subsidy even though disability benefits were "payable for life and calculated in a manner similar to retirement subsidies in general." *Id.* at 925. Citing the Senate Report, the Fifth Circuit nevertheless concluded that because the benefit was a "qualified disability benefit," it could not be a retirement-type subsidy. *Id.* ("Although the regulations do not define a 'retirement-type subsidy,' the legislative history makes clear that the term does not include disability benefits. . . ."); *see also Arndt,* 182 F.3d at 541 ("What we need to decide is whether under ERISA [plaintiff's] benefits are accrued; are a retirement subsidy; or, on the other hand, whether they are disability benefits."). The holding in *Williams* is equally applicable here.

In an attempt to avoid the inevitable, Plaintiffs seek to analogize the IRD benefit to plant shutdown benefits, which are payable in the event that a plant in which the beneficiary works is forced to close.

Plaintiffs note that some courts have concluded that plant shutdown benefits are retirement-type subsidies when the benefits continue beyond normal retirement age and exceed the amount payable under an actuarially reduced normal retirement benefit. *See, e.g., Bellas,* 221 F.3d at 532 ("[U]npredictable contingent event benefits that provide a benefit greater than the actuarially reduced normal retirement benefit are retirement-type subsidies . . . if the benefit continues beyond normal retirement age."); *Richardson,* 67 F.3d at 1468-69 (holding that a shutdown benefit was a retirement-type subsidy where it continued past normal retirement age and "exceed[ed] what . . . employees would have received as normal retirement benefits"); *but see, e.g., Ross,* 847 F.2d at 333-34 (holding that a plant shutdown benefit was not a retirement-type subsidy). Plaintiffs argue that, like the plant shutdown benefits in *Bellas* and *Richardson,* the IRD benefit is triggered by a contingent event (namely, disability), it continues after normal retirement age, and it provides lifetime benefits based on factors such as age and years of service.

Plaintiffs' effort to compare the IRD benefit to plant shutdown benefits is unavailing for two reasons. First, *Bellas* and *Richardson* involved shutdown benefits that exceeded the amount payable under the normal retirement benefit. As explained above, the IRD benefit may not exceed the amount that would be payable under the Normal Retirement Pension if the beneficiary became disabled on the day he reached

normal retirement age.[12] Second, the Senate Report discussed above specifically excludes from the definition of retirement-type subsidy only those plant shutdown benefits "that do[ ] not continue after retirement age." *See Bellas,* 221 F.3d at 532 ("[T]he Senate Report clearly suggests that plant shutdown benefits that continue after normal retirement age are retirement-type subsidies. . . ."); *Richardson,* 67 F.3d at 1468 ("We read the Senate Report to mean that shutdown benefits that do continue after retirement age are a retirement-type subsidy."). By contrast, the same report provides without qualification that disability benefits are not to be counted as retirement-type subsidies. The Court has no basis to assume that Congress, having expressly distinguished between disability benefits and plant shutdown benefits, intended that they be treated identically. Even if some shutdown benefits may qualify as retirement-type subsidies (a proposition that this Court need not, and does not, decide), disability benefits do not.

In sum, the Court concludes that the IRD benefit is not an accrued benefit, an early retirement benefit,

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[12] Plaintiffs argue that the present value of Plaintiff Robinson's IRD benefit exceeds what he would be due under an Early Retirement Pension beginning at age 55. Pls.' Trial Mem. 39 [doc. # 71]. As explained above, the proper comparison is between the IRD benefit and the "benefit which would be provided for the participant if he separated from the service at normal retirement age." 26 U.S.C. § 411(a)(9). The Plan explicitly forbids the former to exceed the latter. Ex. 35 at 3272.

or a retirement-type subsidy. Therefore, the anti-cutback protections of Section 1054(g) do not apply to the IRD benefit.

d. Ancillary Benefit

There is yet another reason why the IRD benefit is not subject to the anti-cutback provision of ERISA, and that is because the IRD benefit is an "ancillary benefit." Under 26 C.F.R. § 1.411(d)-3(g)(2), the term ancillary benefit means:

> (ii) A benefit payable under a defined benefit plan in the event of disability (to the extent that the benefit exceeds the benefit otherwise payable), but only if the total benefit payable in the event of disability does not exceed the maximum qualified disability benefit, as defined in section 411(a)(9). . . .

See also 26 C.F.R. § 1.411(a)-7(1)(ii) (noting that "accrued benefits do not include ancillary benefits not directly related to retirement benefits such as . . . disability benefits not in excess of the qualified disability benefit"); 26 C.F.R. § 1.411(a)-7(c)(3) (referring to "ancillary benefits not directly related to retirement benefits such as . . . disability benefits not in excess of the qualified disability benefit"). The regulations' categorization of disability benefits as ancillary benefits is consistent with a House Conference Report on ERISA, which explained that

> [u]nder the conference substitute, the term 'accrued benefit' refers to pension or retirement benefits. *The term does not apply to ancillary benefits, such as* payment of medical expenses (or insurance premiums for such expenses), or *disability benefits which do not exceed the normal retirement benefit payable at age 65 to an employee with comparable service under the plan,* or to life insurance benefits payable as a lump sum.

H.R. Conf. Rep. No. 93-1280 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5038, 5054 (emphasis added) [hereinafter House Report].

Thus, under both the regulations and the House Report, a disability benefit is an ancillary benefit if it does not exceed the amount payable as a normal retirement benefit. As explained above, this definition precisely describes the IRD benefit, which by its terms cannot exceed the Normal Retirement Pension amount payable if the beneficiary attained Normal Retirement Age on the day he became disabled. Consequently, the IRD benefit "does not exceed the maximum qualified disability benefit, as defined in section 411(a)(9)." *See* 26 C.F.R. § 1.411(d)-3(g)(2). It is, therefore, an ancillary benefit, and as such, it is not subject to the anti-cutback provisions of Section 1056(g). 26 C.F.R. § 1.411(d)-3(b)(3)(i).

Plaintiffs nevertheless argue that the IRD benefit is not an ancillary benefit because Plan documents describe it in the same terms as other pensions. For instance, the pre-amendment Plan refers to the IRD

benefit as an "IRD Pension," describes the IRD benefit in the "Pension" section of the Plan along with the Normal Retirement Pension and Early Retirement Pension, and uses years-of-service and rate-of-contribution criteria to determine a beneficiary's eligibility for the IRD benefit, just as the other pensions do. Ex. 35 at 3258-73 ("Pension Eligibility and Amounts" heading under which the IRD benefit is described); *id.* at 3270 (describing the IRD benefit as a "Pension"); *id.*(describing eligibility criteria). Moreover, Plaintiffs argue that the IRD benefit is not an ancillary benefit because it is not "subordinate" to the pension benefits offered by the Plan. Instead, like the other pension benefits, the IRD benefit continues past retirement age and is paid in the form of a lifetime annuity. By contrast, the Plan specifically states that health benefits are ancillary benefits that are "subordinate to the retirement benefits provided by the Plan." Ex. 35 at 3326 ("The retiree health benefits the Plan may provide, in whole or in part, are ancillary benefits and do not in any way constitute a part of a Pensioner's or Beneficiary's Accrued Benefit."). Thus, Plaintiffs argue, the IRD benefit is a pension and not an ancillary benefit.

The portions of the pre-amendment Plan cited by Plaintiffs suggest that Defendants themselves may have believed that the IRD benefit was a pension benefit and not an ancillary benefit. But whatever Defendants' beliefs may have been does not change the fact that the IRD benefit does not qualify in substance as an ancillary benefit under the regulations and the

House Report. *See Rombach*, 211 F.3d at 193 (finding unpersuasive plaintiff's argument that a disability benefit was a pension "because [defendant] called it a 'pension benefit' and made it a part of its master pension plan that included a number of different types of pensions"); *id.* at 194 ("In our view, it does not matter that [defendant] called the disability retirement pension portion of its plan a 'pension benefit' and made it part of its master 'pension plan.' Its meaning and function remained clear; it was a benefit triggered by disability."). Nor is the IRD benefit any less an ancillary benefit because it is substantial in amount and continues past normal retirement age. The regulations and House Report make clear that a disability benefit is an ancillary benefit so long as it does not exceed the amount payable at normal retirement, an amount that can be quite substantial and may last a very long time. Indeed, some disability benefits do not even *begin* until normal retirement age; yet, courts still deem such benefits to be ancillary benefits if they are triggered by disability.[13] *See Arndt*, 182 F.3d at 544

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[13] In arguing that the IRD benefit is not an ancillary benefit, Plaintiffs cite *Heise v. Genuine Parts Co.*, 900 F. Supp. 1137 (D. Minn. 1995). In *Heise*, the court upheld as reasonable a plan administrator's determination that the plan's disability benefit was a retirement benefit rather than an ancillary benefit. *Id.* at 1145-48. For a couple of reasons, the Court declines to alter its ruling on the basis of *Heise*. First, at the outset of its decision, the district court in *Heise* expressed skepticism that the outcome of the case turned on federal law. Certainly, the decision did not involve any of the statutory

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(noting that even "payments [that] are not paid until retirement age" are disability payments if they are triggered by disability); Nondiscrimination Requirements for Qualified Plans, 56 Fed. Reg. 47,524, 47,531 (Sept. 19, 1991) (noting that a qualified disability benefit "can commence . . . at normal retirement age," and reaffirming that "[a] disability benefit that is not in excess of a qualified disability benefit is an ancillary benefit . . . "); *cf.* 26 C.F.R. § 1.411(d)-3(g)(2)(ii), (vi) (noting specifically that "[a] plant shutdown benefit" is an ancillary benefit if it "does not continue past retirement age," but applying no such duration requirement to "[a] benefit payable

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provisions at issue here. Instead, the decision depended on a construction of the language of the plan's documents. *Id.* at 1145. ("The court is not persuaded . . . that the Committee's calculation of Heise's benefits turns on a construction of Section 415 [of the Code]. This case concerns the way Heise's disability benefit has been calculated under the Plan. The calculation necessarily depends on an interpretation of the plan terms."). As a result, the court's conclusions as to the meaning of terms such as "retirement benefit" are largely plan-specific and have no applicability in this case. *See id.* at 1147 (listing five criteria for determining the reasonableness of the administrator's decision, four of which relate to the plan's terms and only one of which relates to ERISA's requirements). Second, the court in *Heise* held only that the plan administrator's conclusion was reasonable, not that it was correct. The court's decision rested on the substantial deference due the plan administrator. *See id.* at 1145 (noting that the administrator's decision would be reversed only if "extraordinary [sic] imprudent or extremely unreasonable" (internal quotation marks omitted)). Here, the Plan administrators contend that the IRD benefit is an ancillary benefit. Thus, the deference *Heise* showed plan administrators would favor Defendants in this case, not Plaintiffs.

under a defined benefit plan in the event of disability"). Therefore, the Court sees no reason to depart from its conclusion that the IRD benefit is an ancillary benefit, and thus ineligible for protection under the anti-cutback rule. Accordingly, Defendants are entitled to judgment on Count One of Plaintiffs' Amended Complaint.

B. Contractual Vesting

Even if ERISA's anti-cutback provision does not apply to the IRD benefits, the benefits may still be protected from reduction by contract if they have vested. For "[n]othing in ERISA . . . forbids or prevents an employer from agreeing to vest employee welfare benefits or from waiving its ability to terminate or amend unilaterally a plan. . . ." *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 77 (2d Cir. 1996). In the Court's view, Plaintiffs' arguments for contractual vesting present a closer question than Plaintiffs' reliance on the anti-cutback provisions of ERISA. Nonetheless, the Court concludes that the terms of the Plan documents gave the Trustees the right to amend the Plan and adopt the $35,000 earnings limitation for IRD benefits.

"Under ERISA it is the general rule that an employee welfare benefit plan is not vested and that an employer has the right to terminate or unilaterally to amend the plan at any time." *Id.* at 77. However, if the employer promises to vest certain rights, that promise will be enforced. Whether an employer has

made such a promise is a "matter of contractual interpretation," to be resolved by the trier of fact, with any ambiguities construed against the plan's drafter. *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1211-12 (2d Cir. 2002). Thus, in the typical case in which the contractual vesting of welfare benefits is alleged, the trier of fact is called upon to determine whether there exists language in a plan document indicating that benefits have become vested. Because the employer retains a right unilaterally to amend or terminate welfare benefits in absence of such language, it is a plaintiff's burden to prove that such vesting language exists.[14]

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[14] The vast majority of Second Circuit decisions regarding the vesting of contractual rights have dealt with whether the lower court properly granted summary judgment. As a result, the decisions discuss the standard for deciding whether summary judgment was appropriate and not the standard a trier of fact (such as this Court in this case) should use to resolve finally a contractual vesting claim. *See, e.g., Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 97 (2d Cir. 2001) ("In this Circuit, to avoid summary judgment on an ERISA contractual vesting claim, plaintiffs need only identify specific written language that is reasonably susceptible to interpretation as a promise." (internal quotation marks omitted)); *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 84 (2d Cir. 2001) ("[A] plaintiff need only point to written language capable of reasonably being interpreted as creating a promise to survive an employer's summary judgment motion." (internal quotation marks omitted)); *Schonholz*, 87 F.3d at 78 (remanding a contractual vesting claim because plaintiff could identify "written language capable of reasonably being interpreted as creating a promise to vest . . . "). Apart from noting that the issue is a "matter of contractual interpretation" and that ambiguities

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It appears, however, that a different rule applies when the benefits at issue are disability benefits. *Gibbs v. CIGNA Corp.*, 440 F.3d 571, 576 (2d Cir. 2006) ("Disability plans are treated somewhat differently than other welfare plans for purposes of vesting."). For the Second Circuit has held that "*absent explicit language to the contrary,* a plan document providing for disability benefits promises that these benefits vest with respect to an employee no later than the time that the employee becomes disabled." *Feifer,* 306 F.3d at 1212 (emphasis added). As a result, an employer opposing a contractual vesting argument in the context of a disability plan bears the burden of identifying "explicit language reserving [the employer's] right to terminate or alter a disabled employee's benefits." *Gibbs,* 440 F.3d at 577 (internal quotation marks omitted).

Defendants cite several cases for the proposition that vesting may occur only "when the employer promises the employee a lifetime welfare benefit through specific, written language contained in a formal plan document." Defs.' Pre-Trial Opening Brief [doc. # 69] at 37 (citing cases). But the cases Defendants cite are easily distinguishable, as they do not deal with disability benefits. *See, e.g., Abbruscato v. Empire Blue Cross & Blue Shield,* 274 F.3d 90, 97 (2d Cir. 2001) (discussing whether life insurance benefits

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should be construed against the document's drafter, the Second Circuit has done little to flesh out the standards that a trier of fact should apply in resolving a contractual vesting claim.

had vested); *Am. Fed'n of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 982 (2d Cir. 1997) (discussing retirement benefits). *Feifer* establishes that a different standard applies to disability benefits than to other types of benefits, and that vesting of the disability benefits occurs upon disability "absent explicit language to the contrary." 306 F.3d at 1212.

Exactly what constitutes "explicit language" sufficient to prevent contractual vesting of disability benefits is not entirely clear, however. Is language explicitly reserving the employer's right to amend the plan at any time sufficient, or must an employer do more than merely reserve the right to amend the plan? For example, must the employer also explicitly reserve the right to reduce disability benefits after the employee has become disabled? One could certainly argue that, as a matter of policy, requiring the employer to expressly reserve the right to reduce disability benefits to a disabled employee would force employers to articulate their right to amend disability benefits in a manner that leaves no possibility of confusion. On the other hand, if employers were compelled to spell out their power to alter or amend every aspect of every disability plan merely to avoid a vesting argument, plan documents, including SPDs, would become even more lengthy and unwieldy than they currently are. Such a requirement would be particularly inefficient in the case of SPDs. The Court has not been directed to any decision that, in the context of contractual vesting, has required an employer explicitly to reserve the right to reduce

disability benefits after the employee has become disabled. In absence of clear guidance from the Second Circuit, the Court declines to impose such a requirement and holds instead that an employer can satisfy the Second Circuit's "explicit language to the contrary" standard with language in the plan that expressly makes clear the employer's unrestricted power to change the plan at any time.

Decisions involving claims that disability benefits have contractually vested are infrequent. *Feifer* itself did not discuss whether the plan at issue contained explicit language negating vesting. In *Gibbs v. CIGNA Corp.*, the Second Circuit recently found an absence of explicit language preventing the vesting of disability rights, and indeed found specific evidence to the contrary: "[T]he 1995 SPD states [that] . . . 'Any modification or termination will not affect your right to benefits from a covered *disability that occurred before* the termination or modification' (emphasis added)." 440 F.3d 571, 577 (2d Cir. 2006). By contrast, in *Hartranft v. Hartford Life and Acc. Ins. Co.*, No. 3:01CV 1870(JBA), 2004 WL 2377228 (D. Conn. Sept. 30, 2004), Judge Janet Bond Arterton of this court held that an SPD informed employees unambiguously that the employer was "authorized to change the terms of coverage even after an employee has become disabled, because the provision clearly states that [the employer] may change the plan 'at any time,' and that '[the employer] does not promise the continuation of any health benefits.'" *Id.* at *6.

This case is far closer to *Hartranft* than to *Gibbs*. Several provisions in the Plan and SPDs serve as explicit anti-vesting language. For one, a section of the Plan entitled "Eligibility for an Industry-Related Disability Pension" states that "any . . . terms as deemed necessary by the Trustees may be required as a prerequisite to the granting *or continuance* of an Industry-Related Disability Pension." Ex. 35 at 3270-71 (emphasis added). This provision would make no sense if the Trustees were forbidden from changing the prerequisites for receipt of an IRD benefit after the beneficiary became disabled, since all beneficiaries of IRD benefits are already disabled at the time they start receiving those benefits. In other words, since Plan participants can only qualify for the IRD benefit if they are already disabled, any change in a "prerequisite to the . . . continuance" of an IRD benefit will necessarily take place after the disability occurs.

The Plan also explicitly describes the Trustees' power to amend the Plan at any time. In a section titled "AMENDMENT, TERMINATION AND GENERAL PROVISIONS," the 1994 Plan provides: "This Plan may be amended at any time by the Trustees, consistent with the provisions of the Trust Agreement." Ex. 35 at 3324; *see also* Ex. 9 at 1082 (same provision in 1999 Plan). Although in its discussion of vested status – in language tracking ERISA's anti-cutback provision and the Senate Report – the Plan expressly forbids amendments that have "the effect of . . . eliminating or reducing an early retirement

benefit or a retirement-type subsidy," the Plan specifically excludes from this protection "a qualified disability benefit (within the meaning of Section 411(a)(9) of the Code)," Ex. 35 at 3295, a term that encompasses the IRD benefit at issue in this case.

The Plan's SPDs similarly and explicitly reserve the Trustees' right to amend the Plan at anytime. *See, e.g.*, Ex. 23 at 2900 (1997 SPD) ("The Trustees are empowered to amend the Plan at any time in accordance with the law and for such purposes as the Trustees deem appropriate. The Trustees are further empowered to terminate the Plan."); Ex. 25 at 3024 (2002 SPD) ("The Board of Trustees reserves the right to terminate, modify, suspend or amend the Pension Plan at any time, in whole or in part, under circumstances allowed by ERISA and the terms of the governing Trust Agreement. The Board will make such changes to the Plan by Plan Amendment."). Indeed, the 1997 SPD noted in its introduction that a beneficiary terminating his employment before January 1, 1994, would receive benefits "determined in accordance with the provisions of the Plan in effect on the date his employment terminated, *except to the extent otherwise specifically provided under subsequent Plan amendments or restatements.*" Ex. 23 at 2866 (emphasis added).

In response, Plaintiffs insist that language in the Plan, which indicated that the IRD benefit would be paid for life, promised that those benefits would not be changed. For instance, Plaintiffs point to a section titled "Benefit Payments Generally," which states: "A

Participant who is eligible to receive benefits under this Plan and who makes application in accordance with the rules of this Plan, shall be entitled upon retirement to receive the monthly benefits provided for the remainder of his life, subject to the provisions of this Plan." Ex. 35 at 3288. Plaintiffs also note that the IRD benefit was to be paid as a "Husband-and-Wife Pension," which the Plan described as "provid[ing] a lifetime pension for a married Participant plus a lifetime pension for his or her surviving spouse, starting after the death of the Participant." Ex. 35 at 3274; *see also* Ex. 18 at 2436 (2002 Plan) (allowing benefits to be provided as Husband-and-Wife Pension or "Lifetime Pension," which "provides a pension for the life of the Participant and ceases with the Participant's death"). Plaintiffs maintain that the Plan's use of "lifetime" language vested Plaintiffs' right to IRD benefits.[15] To support their argument,

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[15] Plaintiffs also cite to documents other than the Plan and SPDs – sometimes described as "non-plan documents" – that also use "lifetime" language. *See, e.g.*, Ex. 28 at 3081 (IRD benefit application form stating, above the signature line, "I will receive the monthly benefit payment listed for my lifetime."); *see also* Ex. 1 at 56-57 (Husband and Wife Pension Rejection Form). In *Moore v. Metro. Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988), the Second Circuit explicitly rejected a claim that non-plan documents had created vested rights. *Moore* held that "absent a showing tantamount to proof of fraud, an ERISA welfare plan is not subject to amendment as a result of informal communications between an employer and plan beneficiaries." *Id.* at 492. However, in a footnote in *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76 (2d Cir. 2001), the Second Circuit briefly noted "exit letters given to retiring employees," which had

(Continued on following page)

Plaintiffs also cite to *Devlin,* 274 F.3d at 76, in which the Second Circuit found ambiguity as to whether an employer had explicitly promised to vest life insurance benefits where the SPD contained language referring to "lifetime" benefits. *Id.* at 84-85.

Devlin is inapposite, however, because the plan documents that allegedly vested benefits in that case did not contain language stating that the employer retained the right to amend the plans. *See id.* More relevant is *Abbruscato,* 274 F.3d 90, which involved a plan document that included "lifetime" language but also contained language allowing the employer to amend or terminate benefits "at any time." In *Abbruscato,* the Second Circuit held that "[b]ecause the same document that potentially provided the 'lifetime' benefits also clearly informed employees that these benefits were subject to modification, we conclude that the language contained in the 1987 SPD is not susceptible to an interpretation that promises vested lifetime life insurance benefits." *Id.* at 99; *see also Sprague v. Gen. Motors Corp.,* 133 F.3d

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indicated that an insurance benefit "w[ould] remain constant for life." *Id.* at 85 n.7. *Devlin* stated that the "letters included no indication that this coverage would be reduced or terminated. Such evidence arguably reinforces plaintiffs' interpretation of the relevant plan documents." *Id.* Here, this Court need not decide whether it may consider the non-plan documents Plaintiffs cite, because the documents do not contain language appreciably different from the "lifetime" language contained in the Plan itself. Therefore, the non-Plan documents would not alter the Court's conclusions in any respect.

388, 401 (6th Cir. 1998) (en banc) ("We see no ambiguity in a summary plan description that tells participants both that the terms of the current plan entitle them to health insurance at no cost throughout retirement and that the terms of the current plan are subject to change."). Though *Abbruscato* dealt with a life insurance benefit – and therefore the burden was on plaintiffs to show explicit vesting language, whereas here the burden is on the employer to point to language explicitly negating vesting – the conclusion reached in *Abbruscato,* that "lifetime" language does not render an explicit right-to-amend clause ambiguous, is equally applicable in this case. *But cf. Moore,* 856 F.2d at 493 (noting that "the use of language such as 'lifetime' . . . might conceivably create a triable issue of fact on a contract theory," notwithstanding plan language allowing the employer to amend or revoke benefits at any time, although deciding the case on other grounds).

Abbruscato also considered other plan documents (so-called VIP and VSOP documents) that used "lifetime" language and also contained right-to-amend clauses. The court held that the VIP and VSOP documents were ambiguous, making summary judgment on plaintiffs' contractual vesting claims inappropriate. *Abbruscato,* 274 F.3d at 98. However, as the court noted, "neither the VSOP nor the VIP contain[ed] unambiguous reservation of rights clauses. . . ." *Id.* The VSOP document provided that the employer "reserves the right to amend and/or terminate the VSO *Program* at any time for any

purpose." *Id.* at 97 (emphasis in original). The Second Circuit held that this provision "is capable of being interpreted to mean that [the employer] merely reserved the right to change the *program* for those individuals who have not already retired under the terms described, not the right to alter the described benefits for those individuals who had retired under those terms." *Id.* at 98 (emphasis in original). The VIP document stated that the employer "reserves the right to amend and/or withdraw the VIP at any time for any purpose with respect to any employee, *up to the date on which that employee's Resignation and General Release and Covenant Not to Sue* becomes effective." *Id.* (emphasis in original). As the Second Circuit explained, this right-to-amend provision had expired "by its own terms." *Id.*

By contrast to the VSOP document in *Abbruscato*, the Plan document in this case explicitly reserves the Trustees' right to amend the entire Plan (not just the program) and to impose "any . . . terms as deemed necessary" for receipt of IRD benefits. Furthermore, the Plan expressly exempts disability benefits from its anti-amendment protections. And unlike the VIP document, the Plan does not impose any durational limitations on the Trustees' power to amend. Indeed, the Plan's general right-to-amend clause, which states that "[t]his Plan may be amended at any time by the Trustees" is materially similar to the *Abbruscato* SPD's right-to-amend clause, which, the court held, unambiguously stated

that the "company . . . reserves its right to amend each of the Plans at any time." *Id.*

In sum, notwithstanding the Plan's references to "lifetime" benefits, the Court concludes – in accordance with *Abbruscato* – that the Plan contained explicit anti-vesting language because the Plan documents unambiguously reserved the Trustees' authority to amend or alter the IRD benefits at any time. In fact, the present case is even clearer than *Abbruscato,* because the Plan's statement that the IRD benefit would be paid "for the remainder of [a beneficiary's] life" was explicitly made "subject to the provisions of this Plan," which include the right-to-amend provisions. The Plan also informed beneficiaries that the Trustees retained the power to impose "any" additional restrictions on the IRD benefit "as deemed necessary," and committed eligibility determinations to their "sole and absolute discretion." And while "[a]nnual pension benefit[s] . . . commencing at Normal Retirement Age" were explicitly exempted from the right-to-amend clause, the IRD benefit was not. To the contrary, the Plan's discussion of vested status provided that "a qualified disability benefit" merited no protection, lending strong support for the conclusion that Plan participants were forewarned that the IRD benefit itself was subject to change.

Language indicating that the IRD benefit would be paid for the beneficiary's life was thus merely a factually correct statement of the benefits then provided by the Plan – benefits that were expressly subject to amendment "at any time." *See Abbruscato,*

274 F.3d at 100 ("'[T]he promise made to retirees was a qualified one: the promise was that retiree medical benefits were for life provided the company chose not to terminate the plans, pursuant to clauses that preserved the company's right to terminate the plan under which those benefits are provided.'" (quoting *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 58 F.3d 896, 904 n.12 (3d Cir. 1995))). Even after imposition of the earnings limitation, it remains true that an IRD beneficiary will receive his benefits "for the remainder of [his] life" – so long as he continues to qualifies for them (the earnings limitation being merely another eligibility criterion). *See* Ex. 35 at 3270-71 (expressly giving the Trustees the authority to determine the prerequisites to "the granting *or continuance* of an Industry-Related Disability Pension") (emphasis added).[16] Therefore, just as the Second Circuit in *Abbruscato* found the combination of "lifetime" language and a right-to-amend clause to be unambiguous, so this Court concludes that the Plan contained explicit language sufficient to prevent contractual vesting of IRD benefits.

Both sides have argued that recourse to non-record evidence is unnecessary on the question of contractual vesting; in fact, neither has suggested

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[16] Indeed, because IRD benefits would continue only so long as the beneficiary remains disabled, it is clear from the Plan itself that IRD benefits are not "lifetime" benefits in the sense that they continue without change for the beneficiary's entire life, no matter what happens.

that any non-record evidence bearing on vesting even exists. The Court agrees. The Plan and SPDs are clear and unambiguous, making extrinsic evidence (even if any existed) neither necessary nor admissible. *See Feifer,* 306 F.3d at 1210-11. As recited above, on the basis of the evidence in the record, Defendants are entitled to judgment on Count Two of Plaintiffs' Amended Complaint.

C. Promissory Estoppel

Promissory estoppel principles are applied in the ERISA context. To make out an estoppel claim under ERISA, a plaintiff must show "(1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced." *Schonholz v. Long Island Jewish Med. Center,* 87 F.3d 72, 79 (2d Cir. 1996). In addition, the plaintiff must demonstrate "extraordinary circumstances." *Aramony v. United Way Replacement Benefit Plan,* 191 F.3d 140, 151-52 (2d Cir. 1999). The Second Circuit has explained that the extraordinary circumstances requirement exists "[i]n order to lessen the danger that commonplace communications from employer to employee will routinely be claimed to give rise to employees' rights beyond those contained in formal benefit plans. . . ." *Id.* at 151.

To show that Defendants promised not to alter the IRD benefit, Plaintiffs point to precisely the same evidence they marshaled in support of their contractual vesting claim: Plan provisions indicating that

payments would be made "for life." The Court has already found that these statements, when read in conjunction with other provisions expressly reserving the Trustees' right to amend the Plan, did not constitute a contractual promise that benefits would never be reduced. *A fortiori,* then, these same provisions cannot satisfy the first element of Plaintiffs' promissory estoppel claim.

Even if the Court were to find that Plaintiffs had satisfied the "promise" element of the cause of action, Plaintiffs cannot demonstrate the requisite "extraordinary circumstances." Typically, courts have found extraordinary circumstances to exist where plan administrators have used a promise about benefits to induce employees to retire. *See, e.g., Schonholz,* 87 F.3d at 79 ("If [the employer] had not transmitted the December 18 letter [promising certain benefits], Schonholz might never have submitted her resignation."); *DePace v. Matsushita Elec. Corp. of Am.,* 257 F. Supp. 2d 543 (E.D.N.Y. 2003) (finding that plaintiffs had made out a valid estoppel claim where their employer made statements about benefits to induce participation in a voluntary retirement program); *see also Devlin,* 274 F.3d at 86 ("*Schonholz* provides an example of . . . extraordinary circumstances, where the employer used promised severance benefits to induce the plaintiff to retire."). By contrast, where there was no evidence that an employer made a promise for the purpose of inducing action, courts have not found "extraordinary circumstances." *See, e.g., Aramony,* 191 F.3d at 152-53 (stating that a

"combination of [a plan's] ambiguity – which we have concluded does not alone suffice to establish extraordinary circumstances – and the promise element of ordinary estoppel analysis does not" establish promissory estoppel); *Devlin v. Transp. Commc'ns Int'l Union,* 173 F.3d 94, 102 (2d Cir. 1999) ("Admittedly, there is evidence in this record to support the notion that some employees . . . considered the promised medical benefits in timing their retirements. But reliance . . . would not by itself render this case 'extraordinary.'"); *id.* ("In the instant case . . . there is no evidence to suggest that appellees sought the retirement of any of the appellants, or that the promise of free, lifetime health benefits was used to intentionally induce any particular behavior on appellants' part.").

Plaintiffs offer no evidence – and indeed make no allegations – that Defendants made the "lifetime" statements in the Plan in order to induce Plaintiffs to choose to receive benefits under the IRD plan. Nor could they, since the same "lifetime" statements made in relation to the IRD benefit apply equally to other Plan benefits such as the Early Retirement Pension. Instead, Plaintiffs argue that other factors besides inducement might give rise to "extraordinary circumstances," citing suggestive language from several Second Circuit decisions. *See Aramony,* 191 F.3d at 152 n.5 (noting that "the alleged promise in *Devlin* was not an intentional inducement of any kind, *nor was it in any other way "extraordinary"* (emphasis added)); *see also Devlin,* 274 F.3d at 86 (declining to

decide "whether extraordinary circumstances other than intentional inducement would suffice"). Even if proving intentional inducement were not the only way to establish extraordinary circumstances, however, Plaintiffs have offered no evidence of any additional circumstances – extraordinary or otherwise – beyond the basic elements of an ordinary promissory estoppel claim.[17] *Cf. Arnold v. Lucks,* 392 F.3d 512, 520 (2d Cir. 2004) (noting that defendants conceded that circumstances were extraordinary because defendants had initiated an arbitration in 1981 demanding additional contributions from plaintiff's employer on plaintiff's behalf; had won the arbitration and received the additional contributions from plaintiff's employer; and then, seventeen years later, told plaintiff that he was not eligible to participate in the plan and that his health and pension coverage would be terminated). Therefore, Defendants are entitled to judgment on Count Three of Plaintiff's Amended Complaint.

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[17] At oral argument, counsel for Plaintiffs suggested that Defendants intentionally induced employees to continue working in the sheet metal industry with the promise of lifetime benefits in the event of disability. But to accept Plaintiffs' argument would render the "extraordinary circumstances" requirement meaningless, since *all* employees rely upon the benefits their employer offers when choosing to continue working for the employer. In any event, even if such circumstances would qualify as extraordinary for purposes of an ERISA promissory estoppel claim, Plaintiffs have presented no evidence that would permit the Court to make such a finding or even to surmise that any such evidence potentially exists.

D. Breach of Fiduciary Duty

ERISA creates certain fiduciary duties on the part of plan trustees and administrators. *Wilkins v. Mason Tenders Dist. Council Pension Fund,* 445 F.3d 572, 579 (2d Cir. 2006). Plaintiffs allege that Defendants violated these duties by failing to communicate material facts about the IRD benefits and to provide adequate SPDs. Specifically, Plaintiffs assert that Defendants failed to communicate adequately the fact that the IRD benefit might be altered after beneficiaries became disabled, and that Defendants' SPDs did not sufficiently warn participants about the possibility.

1. Failure to Communicate Material Facts

"'[W]hen a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries.'" *Devlin,* 274 F.3d at 88 (alteration in original) (quoting *In re Unisys,* 57 F.3d at 1264). "To establish a claim for breach of fiduciary duty based on alleged misrepresentations concerning coverage under an employee benefit plan, plaintiffs must show: (1) that the defendant was acting in a fiduciary capacity when it made the challenged representations; (2) that these constituted material misrepresentations; and (3) that plaintiffs relied on those misrepresentation [sic] to their detriment."

McMunn v. Pirelli Tire, LLC, 161 F. Supp. 2d 97, 120 (D. Conn. 2001). Determining whether a false statement was material is ordinarily a fact-specific inquiry, turning on such factors as: "how significantly the statement misrepresents the present status of internal deliberations regarding future plan changes; the special relationship of trust and confidence between the plan fiduciary and beneficiary; whether the employee was aware of other information or statements from the company tending to minimize the importance of the misrepresentation or should have been so aware, taking into consideration the broad trust responsibilities owed by the plan administrator to the employee and the employee's reliance on the plan administrator for truthful information; and the specificity of the assurance." *Ballone v. Eastman Kodak Co.,* 109 F.3d 117, 125 (2d Cir. 1997) (internal citations omitted).

As explained above, in the Court's view neither the Plan nor the SPDs contained material misstatements. The Plan explicitly informed beneficiaries that payments under the IRD benefit were "subject to the provisions of [the] Plan"; that the Trustees were empowered to impose "any" additional restrictions on the IRD benefit that they "deemed necessary"; and that the IRD benefit could be amended by the Trustees "at any time." The SPDs similarly emphasized the Trustees' right to amend the Plan at any time. *See, e.g.,* Ex. 23 at 2900 (1997 SPD); Ex. 25 at 3024 (2002 SPD).

In support of their claim, Plaintiffs emphasize certain non-plan documents – the IRD benefit application forms and the Husband and Wife Pension Rejection Forms, both of which use "lifetime" language and neither of which mentions the right-to-amend clause. *See, e.g.,* Ex. 1 at 56-57 (showing that the Husband and Wife Pension Rejection Form cautions: "I understand that rejecting this form of pension means lifetime benefits will not be paid to my spouse"); Ex. 28 at 3081 (showing that the IRD benefit application form has printed, above the signature line, "I will receive the monthly benefit payment listed for my lifetime"). However, taking account of all the circumstances, the Court concludes for several reasons that these non-plan documents by themselves do not establish a material misrepresentation by Defendants.

First, as noted above, the "lifetime" language those documents use was a factually correct statement of the benefits then existing under the Plan, benefits that were subject to amendment and additional eligibility criteria. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405 (6th Cir. 1998) ("GM never told the early retirees that their health care benefits would be fully paid up or vested upon retirement. What GM told many of them, rather, was that their coverage was to be paid by GM for their lifetimes. This was undeniably true under the terms of GM's then-existing plan."). Second, these non-plan documents were relatively cursory in nature – in the case of the Husband and Wife Pension Rejection Form,

only a few pages – and did not purport to set out the full terms of the Plan. The Court does not believe that any reasonable beneficiary would have looked at these forms and assumed that they spelled out the full terms and conditions of the IRD benefit. Third, beneficiaries were repeatedly informed, through successive versions of the Plan and SPDs, that IRD benefits might be amended. *See McMunn,* 161 F. Supp. 2d at 124 ("Where . . . clear reservations of rights are used consistently in the plan documents, employees reasonably should have been aware that their retiree benefits were subject to change. . . ."). Consequently, the Court concludes that, even if the language from these non-plan documents could be construed as incomplete (a conclusion that the Court does not endorse), they do not constitute material misstatements under these circumstances.

Plaintiffs argue that this case is analogous to *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation,* 57 F.3d 1255 (3d Cir. 1995), in which an employer, in plan language and in oral communications with its employees, stated that benefits would continue "for life," despite a right-to-amend clause in the plan and SPDs. *Id.* at 1259. The Third Circuit held that the beneficiaries could pursue their breach of a fiduciary duty claim:

> [T]his is not a case involving an employer's "duty to remind." Instead, this case is more accurately characterized as a dispute over an employer's duty, as an ERISA fiduciary, not to misinform employees through material

> misrepresentations and incomplete, inconsistent or contradictory disclosures. . . . Here the district court found that [the plan sponsor] affirmatively and systematically represented to its employees that once they retired, their medical benefits would continue for life – even though as the district court concluded in rejecting the retirees' contract claim, the plans clearly permitted the company to terminate benefits.

Id. at 1264. However, in reaching its conclusion, the Third Circuit emphasized that the employer's misleading communications to beneficiaries were widespread and systematic. As the court put it, "Here the district court found that virtually the entire company management had consistently misrepresented the plan, not just on one occasion or to one employee, but over a period of many years and both orally (in group meetings) and in writing (in newsletters) as well." *Id.* at 1265. Thus, *In re Unisys* was "not a case where one or two low level benefits counselors told a few retirees that their benefits would continue for life. The message that medical benefits would last for life was confirmed repeatedly and systematically throughout the . . . organization, by all levels of management, in writing and verbally." *Id.* at 1260. Moreover, the company knew that "its employees believed the assurances of lifetime benefits they had been given and were making retirement decisions based on their understanding that when they retired, the benefits that they had at the time they retired would continue for life." *Id.* at 1266.

The repeated, systematic misrepresentations in *In re Unisys* were far more extreme than those alleged in the present case. There is no evidence that Plaintiffs ever asked Defendants about whether benefits might later be altered, or that Defendants gave misleading responses to such questions. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., U.A.W. v. Skinner Engine Co.*, 188 F.3d 130, 150 (3d Cir. 1999) ("[T]here is no evidence that suggests that the company stood silent and failed to properly advise employees when specifically asked about the duration of retiree benefits."); *McMunn*, 161 F. Supp. 2d at 122 & n.117 ("[O]ther circuits have focused on whether the employer misled employees when specifically asked about the duration of retiree benefits, or made promises that retiree medical benefits could not be changed in the future, despite the fact that the Plans at issue did not provide for vested benefits.") (citing cases). Nor is there is any indication that Defendants knew that Plan beneficiaries were selecting the IRD benefit under the mistaken assumption that its benefits were vested. *Cf. McMunn*, 161 F. Supp. 2d at 124 ("[W]here a company has deliberately fostered the belief that retirement benefits are lifetime benefits, and is aware that its employees incorrectly – if understandably – believe that their medical benefits will continue unchanged for the duration of their retirement, . . . a reservation of rights in an SPD does not insulate the company from its obligation to provide 'complete and accurate information.'"). Therefore, the Court does not find a breach of fiduciary duty in Defendants'

failure to "tell the [beneficiaries] at every possible opportunity that which it had told them many times before – namely, that the terms of the plan were subject to change." *Sprague,* 133 F.3d at 405; *see also Adams v. Tetley USA, Inc.,* 363 F. Supp. 2d 94, 108-09 (D. Conn. 2005) (holding that while an employer's executives promised "lifetime" benefits to plaintiff in response to a question during a meeting, plaintiff "could not reasonably have relied on this misrepresentation, because the next year he signed a written severance agreement that contained no 'lifetime' promise, and a benefits summary that contained an explicit reservation of [the employer]'s right to terminate the retiree medical plan").

2. Failure to Provide an Adequate SPD

An SPD must be

> written in a manner calculated to be understood by the average plan participant and must be sufficiently accurate and comprehensive to apprise such participants and beneficiaries of their rights and obligations under the plan. ERISA contemplates that the summary [plan description] will be an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary.

Layaou v. Xerox Corp., 238 F.3d 205, 209 (2d Cir. 2001) (internal quotation marks and citation omitted) (alteration in original). "The format of the summary

plan description must not have the effect to misleading, misinforming or failing to inform participants and beneficiaries." 29 C.F.R. § 2520.102-2(b). "In assessing the adequacy of an SPD, [the Court] consider[s] the document as a whole." *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 8 (2d Cir. 1997).

Plaintiffs essentially make the same arguments in support of their argument regarding the inadequacy of the SPDs as they made in their contractual-vesting, promissory-estoppel, and failure-to-communicate claims. Plaintiffs argue that Defendants' SPDs were misleading because they:

> 1) misrepresent[ed] the IRD Pension as a *pension* and/or lifetime benefit that, like all other pension benefits under the plan, accrues and/or vests upon disability; and 2) d[id] not communicate that the IRD Pension benefit may be lost for reasons other than those that are specified such as recovery from disability – *i.e.*, that defendants might treat the IRD Pension as a welfare and/or ancillary benefit that can be reduced and/or terminated at any time – or emphasize the importance of the reservation of rights clause with respect to the IRD Pension since the Plan represents that it is a pension and/or lifetime benefit like all other pension benefits under the plan.

Pls.' Trial Mem. [doc. # 71] at 61.

In support of these arguments, Plaintiffs point to the same SPD language they highlighted in support

of their other claims. And as with those claims, Plaintiffs are unable to point to a single factually incorrect statement made by Defendants. Indeed, the evidence for this claim is in many ways weaker than for Plaintiffs' other claims, because the SPD (unlike the IRD benefit application forms and the Husband and Wife Pension Rejection Forms) explicitly contained a right-to-amend clause:

> The Trustees are empowered to amend the Plan at any time in accordance with the law and for such purposes as the Trustees deem appropriate. The Trustees are further empowered to terminate the Plan.

Ex. 23 at 2900 (1997 SPD); *see* Ex. 25 at 3024 (2002 SPD) ("The Board of Trustees reserves the right to terminate, modify, suspend or amend the Pension Plan at any time, in whole or in part, under circumstances allowed by ERISA and the terms of the governing Trust Agreement. The Board will make such changes to the Plan by Plan Amendment."). The introduction to the 1997 SPD also noted – on the very first page of the document – that a beneficiary who terminated his employment before January 1, 1994, would receive benefits "determined in accordance with the provisions of the Plan in effect on the date his employment terminated, *except to the extent otherwise specifically provided under subsequent Plan amendments or restatements.*" Ex. 23 at 2866 (emphasis added). Beneficiaries were thus put on notice that benefits to which they were entitled under the Plan might be altered by later amendments. Furthermore,

none of the SPDs stated that the IRD plan allowed employment outside the sheet-metal industry without an earnings limitation.

Plaintiffs' strongest evidence that the SPDs inadequately warned employees of future amendments is found in the discussion of "Vested Status" in the 1997 SPD. That document explains: "You achieve Vested Status when you earn the right to a pension. Once you attain Vested Status you will not lose your right to a pension from the Plan if you stop working in the Sheet Metal Industry." Ex. 23 at 2872. The section goes on to list the years of service a beneficiary must perform before achieving vested status. Earlier in the SPD, in the "Terms Used in Describing Your Pension Plan" section, the document defines "Vested Benefit" as "A benefit under the Plan to which a Participant has a nonforfeitable right." Ex. 23 at 2868.

Though the term "vested" may not have been ideal, the Court concludes that the 1997 SPD's discussion of Vested Status does not make it misleading. The SPD makes clear that the import of Vested Status is to prevent beneficiaries from "los[ing] [their] right to a pension from the Plan if [they] stop working in the Sheet Metal Industry." Ex. 23 at 2872. Vested Status does not mean that once a beneficiary becomes entitled to a disability pension, disability benefits are insulated from future changes. Read in context, particularly in conjunction with the right-to-amend

clause, as well as the introduction, the Court does not believe that the Vested Status discussion in the 1997 SPD misleadingly implied to beneficiaries that their IRD benefits could never be altered. In sum, construing each SPD as a whole, the Court concludes that they are adequate, and consequently finds that Defendants did not breach their fiduciary duties as Plaintiffs allege. Therefore, Defendants are entitled to judgment on Count Four of Plaintiffs' Amended Complaint.

E. Mootness

Finally, Defendants argue that the claims of Mr. Donohue and all other IRD benefit recipients over the age of 55 are moot. In view of the Court's ruling that Defendants are not liable to Plaintiffs under any of Plaintiffs' claims, the Court need not (and does not) reach Defendants' argument.

III

For the foregoing reasons, the Court concludes that, in adopting the 2004 amendments, Defendants (1) did not violate ERISA's anti-cutback protections; (2) did not violate contractually-vested rights; (3) did not reduce rights that Plaintiffs had been promised; and (4) did not breach Defendants' fiduciary duties. The Court thus finds for Defendants on each of Plaintiffs' claims. **The Clerk is directed to enter**

judgment for Defendants on all of Plaintiffs' claims and to close the file.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: July 27, 2006.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the ___ day of April two thousand and eight,

ROBERT J. ROBINSON, JR., on behalf of himself and all others similarly situated and
THOMAS J. DONOHUE, on behalf of himself and all others similarly situated,
Plaintiffs-Appellants,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND, PLAN A, MARC E. LEBLANC, MICHAEL J. SULLIVAN, CHARLES HOLT, JOHN G. AGRELA, KENNETH D. ALEXANDER, RONALD PALMERICK, BRUCE STOCKWELL, PHIL MEYERS, R. DEAN STEWARD and PAUL COLLINS JR., *Defendants-Appellees*.

ORDER

Docket No. 06-3923-cv

(Filed Apr. 14, 2008)

Appellants Robert Robinson and Thomas Donohue having filed a petition for rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez
Frank Perez,
Deputy Clerk

STATUTES AND REGULATIONS INVOLVED

Section 411(a)(9) of 26 U.S.C. provides in pertinent part "a qualified disability is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age."

Section 411(d)(6) of 26 U.S.C. provides in pertinent part:

> (A) In general. – A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8), or section 4281 of the Employee Retirement Income Security Act of 1974.
>
> (B) Treatment of certain plan amendments. – For purposes of subparagraph (A), a plan amendment which has the effect of –
>
> > (i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
> >
> > (ii) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

Section 1002(1) of 29 U.S.C., which sets out the definition of terms used in ERISA, provides in pertinent part:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries . . . (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 1002(2)(A) of 29 U.S.C. provides in pertinent part:

> The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program –
>
> > (i) provides retirement income to employees, or
> >
> > (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. . . .

Section 1051 of 29 U.S.C. provides in pertinent part:

> This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than –
>
> (1) an employee welfare benefit plan. . . .

Section 1202(c) of 29 U.S.C. provides in pertinent part:

> Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter.

Section 1054(g) of 29 U.S.C. provides in pertinent part:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(d)(2) or 1441 of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of –
>
> > (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
> >
> > (B) eliminating an optional form of benefit,

> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

Section 1321(a) of 29 U.S.C., which concerns plans covered by the Pension Benefit Guaranty Corporation, provides in pertinent part:

> [T]his subchapter applies to any plan . . . which, for a plan year –
>
> > (1) is an employee pension benefit plan (as defined in paragraph (2) of section 1002 of this title) established or maintained –
> >
> > > (A) by an employer engaged in commerce or in any industry or activity affecting commerce, or
> > >
> > > (B) by any employee organization, or organization representing employees, engaged in commerce or in any industry or activity affecting commerce, or
> > >
> > > (C) by both. . . .

Section 1.401-1(b)(1)(i) of 26 C.F.R. provides in pertinent part that "A pension plan may provide for the payment of a pension due to disability. . . ."

Section 1.411(d)-3(b)(3)(i) of 26 C.F.R. provides in pertinent part:

> Section 411(d)(6) does not provide protection for benefits that are ancillary benefits, other rights and features, or any other benefits that are not described in section 411(d)(6). See § 1.411(d)-4, Q&A-1(d).

Section 1.411(d)-3(g)(2) of 26 C.F.R. provides in pertinent part:

> The term *ancillary benefit* means –
>
> * * *
>
> (ii) A benefit payable under a defined benefit plan in the event of disability (to the extent that the benefit exceeds the benefit otherwise payable), but only if the total benefit payable in the event of disability does not exceed the maximum qualified disability benefit, as defined in section 411(a)(9); . . .

Section 1.411(d)-3(g)(6)(i) of 26 C.F.R. provides in pertinent part:

> The term *early retirement benefit* means the right, under the terms of a plan, to commence distribution of a retirement-type benefit at a particular date after severance from employment with the employer and before normal retirement age Different early retirement benefits result from differences in terms relating to timing.

Section 1.411(d)-3(g)(6)(iii) of 26 C.F.R. provides in pertinent part:

> The term *retirement-type benefit* means –
>
> (A) The payment of a distribution alternative with respect to an accrued benefit; or
>
> (B) The payment of any other benefit under a defined benefit plan . . . that is permitted to be in a qualified pension plan, continues after retirement, and is not an ancillary benefit.

Section 1.411(d)-3(g)(6)(iv) of 26 C.F.R. provides in pertinent part:

> The term *retirement-type subsidy* means the excess, if any, of the actuarial present value of a retirement-type benefit over the actuarial present value of the accrued benefit commencing at normal retirement age or at actual commencement date, if later, with both such actuarial present values determined as of the date the retirement-type benefit commences. Examples of retirement-type subsidies include a subsidized early retirement benefit. . . .

Section 1.411(d)-4 Q&A-1(a) of 26 C.F.R. provides in pertinent part:

> The term "section 411(d)(6) protected benefit" includes any benefit that is described in one or more of the following categories –

(1) Benefits described in section 411(d)(6)(A),

(2) Early retirement benefits (as defined in § 1.411(d)-3(g)(6)(i) and retirement-type subsidies (as defined in § 1.411(d)-3(g)(6)(iv), and

(3) Optional forms of benefit described in section 411(d)(6)(B)(ii).

Section 1.411(d)-4 Q&A-4(b) of 26 C.F.R. provides in pertinent part:

A plan may permit limited discretion with respect to the ministerial or mechanical administration of the plan, including the application of objective plan criteria specifically set forth in the plan. Such plan provisions do not violate the requirements of section 411(d)(6). . . . For example, these requirements are not violated by the following provisions that permit limited administrative discretion:

* * *

(2) Employer authority to determine whether objective criteria specified in the plan (e.g., objective criteria . . . designed to determine whether an employee has a permanent and total disability) have been satisfied. . . .

Section 4022.4(a) of 29 C.F.R. provides in pertinent part:

A participant . . . is entitled to a benefit if under the provisions of a plan . . . on or before the termination date, in the case of a requirement that

a participant . . . become disabled . . . the participant had satisfied the conditions of the plan necessary to establish the right to receive the benefit. . . .